

No. 86643-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

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HUMPHREY INDUSTRIES, LTD.,

*APPELLANT,*

v.

CLAY STREET ASSOCIATES LLC, et al.,

Respondents

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Brief of *APPELLANT*

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## I. Introduction.

Petitioner/plaintiff Humphrey Industries, Ltd. (Humphrey or the dissenter) appeals from the trial court's judgment and orders granted on remand from *Humphrey Indus., Ltd. v. Clay St. Assocs., L.L.C.*, 170 Wn.2d 495, 507, 242 P.3d 846 (2010) (the Opinion), App. A.<sup>1</sup>

Humphrey dissented from the merger of Clay Street Associates, LLC (Clay Street) and "demanded payment under the dissenters' rights provisions of the Washington Limited Liability Act (LLC Act or the Act), chapter 25.15 RCW." *Id.* at 497, ¶ 1. In the prior appeal, this Court reviewed the trial court's award of fees to Clay Street and one of the members and its refusal to award the same to Humphrey. *Id.* at 501, ¶ 9. This Court reversed the award of fees against Humphrey and "remand[ed] for consideration of whether in light of Clay Street's failure to substantially comply with the statute, Humphrey is entitled to attorneys fees" under RCW 25.15.480. *Id.* at 508-09, ¶¶ 25-26.

But on remand, remarkably, the trial court *reinstated* the reversed fee awards against Humphrey and in favor of the LLC and a member. The reinstatement of the reversed awards violates the letter and the spirit of the mandate and the law of the case doctrine embodied in RAP 12.2. Order Re:

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<sup>1</sup> This brief references two sets of clerk's papers. The clerk's papers in the first appeal will be referenced as "2007 CP." The clerk's papers in this second appeal will be referenced as "2011 CP."

Attorneys' Fees (Aug. 30, 2011), 2011 CP 684-97, App. C. Those reinstated fee awards to Clay Street and the Rogels must be reversed.

Compounding this error, the trial court committed another plain and prejudicial error by failing to grant Humphrey restitution and related relief. Since the reversed judgment had already been paid by Humphrey, the "general rule of restitution"<sup>2</sup> applies: "what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error." *Atl. Coast Line R.R. v. Florida*, 295 U.S. 301, 309, 55 S. Ct. 713, 79 L. Ed. 1451 (1935) (Cardoza, J.).<sup>3</sup> The beneficiaries of the error in this case were Clay Street and its other members. Therefore, they are the ones liable to the dissenter in restitution.

It is a well-established principle that "[t]he reversing court can itself direct restitution ..."<sup>4</sup> Because the merits of the controversy are before this Court and the judgment of reversal is final and absolute, this is a proper case for the appellate court to exercise its inherent authority to grant restitution and take other actions as the interest of justice requires. RAP 12.8.

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<sup>2</sup> *Ehsani v. McCullough Family P'ship*, 160 Wn.2d 586, 592, 159 P.3d 407 (2007) (identifying Restatement of Restitution § 74 (judgment subsequently reversed) as the general rule).

<sup>3</sup> Quoted in *Ehsani*, 160 Wn.2d at 595.

<sup>4</sup> Restatement of Restitution § 74 cmt. a. (1937)

The restitution remedy is straightforward. The other members of Clay Street are the real parties in interest. They received the benefit of the \$219,953 payment made to satisfy the reversed judgment. There is unjust enrichment resulting both from their actions taken before the commencement of this suit and after the commencement of this suit. Prior to the commencement of this suit, the other members each received preferential distributions from the sale of the LLC's only asset before the tardy and partial fair value payment was made to the dissenter.<sup>5</sup> They left the LLC a hollow shell. After the commencement of this suit, the other members failed to pay the LLC's lawyers. When the dissenter paid the award for Clay Street's attorney fees, the other members were benefitted—they avoided having to pay those fees themselves.

None of the exceptions to the general rule of restitution apply.<sup>6</sup> There are no "special circumstances."<sup>7</sup> There can be no unclean hands defense in this case, where this Court concluded in the prior appeal: "If any acts of bad faith were committed, they were committed by the other members of Clay Street who sought to bypass the dissenters' rights statute and section 8.1 of their own LLC Agreement, which specifies that the

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<sup>5</sup> 170 Wn.2d at 499, ¶ 6 (\$181,192.64); *id.* at 507, ¶ 20 ("the extreme delay"); Chicago Title Ins. Co., Seller's Statement 5/16/05 (indicating \$277,014 payments to ABO Investments, Joe Rogel and Scott Rogel), 2007 CP 284.

<sup>6</sup> *Ehsani*, 160 Wn.2d at 592-93 (identifying bona fide purchaser for value at an execution sale as an example of an exception to the general rule).

<sup>7</sup> Restatement of Restitution § 74 cmt. c (describing when restitution is inequitable).

property, 'shall not be sold, conveyed, and/or assigned without the mutual consent of each of the members....'"<sup>8</sup>

To avoid needless litigation on a second remand, this Court should exercise its inherent authority and hold Clay Street and the other members jointly liable for restitution of the \$220,959 paid plus interest at the 12% judgment rate since November 19, 2007, and for the prior supplemental judgment of \$98,191 for appellate fees, along with any additional awards granted in this appeal.

If this Court remands for additional proceedings, then the case should be transferred to another judge. With the trial judge's substantial difficulty in putting out of mind his previously expressed views and findings, the transfer of the case to another judge on remand will further the ends of justice.

## **II. Assignments of Error**

1. Did the trial court err when it reinstated on remand the fee awards in favor of Clay Street and Mr. and Mrs. Joseph Rogel against Humphrey pursuant to RCW 25.15.480(2)(b)?

2. Did the trial court err when it declined on remand to grant Humphrey interest on money paid to satisfy the judgments that were reversed on appeal?

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<sup>8</sup> 170 Wn.2d at 508, ¶ 24.

3. Did the trial court err when it declined on remand to rule the other members of Clay Street were individually liable for the prior fair value award, reversed fee awards, interest on the moneys paid, and the supplemental judgment in favor of Humphrey?

*Issues Pertaining to the Assignment of Error.*

No. 1. This Court reversed the trial court's prior award of attorney fees against the dissenter, which had been granted pursuant to RCW 25.15.480(2)(b). RCW 25.15.480(2)(b) authorizes a fee award "if the court finds that party to have acted arbitrarily, vexatiously, or not in good faith." This Court ruled: "the record does not establish Humphrey's actions were arbitrary, vexatious, and not in good faith."<sup>9</sup> Do this Court's rulings preclude the trial court on remand from reinstating the RCW 25.15.480(2)(b) ruling against the dissenter based on the same record? Does the trial court's reinstatement of the fee awards violate the mandate, the law of the case doctrine, and RAP 12.2?

No. 2. The judgment debtor (the dissenter) paid money to satisfy the judgment that was reversed on appeal. Is the judgment debtor entitled to restitution including interest from the judgment creditor?

No. 3. The other members of Clay Street benefitted from the dissenter's payment of the reversed fee judgment to the inactive LLC, which

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<sup>9</sup> 170 Wn.2d at 508, ¶ 24.

has no assets. Before this suit was filed, they benefitted from the use of company information, funds, and the six month deferral of payment to the dissenter for its interest. They also benefitted from the preferential distributions each received before making the initial fair value payment to the dissenter. The other members bypassed both the LLC Agreement and the dissenters' rights statute. Were the other members unjustly enriched by the distributions and by the dissenter's payment to satisfy the reversed fee judgment? Is the dissenter entitled to restitution from them for money in the amount of the reversed fee judgment (\$187,718 plus interest), the prior supplemental judgment for appellate fees and expenses (\$98,191), and any additional awards?

No. 4. If Issue No. 3 is not resolved on review, is the remand to another judge appropriate for the proper and final resolution of the case?

No. 5. Should a dissenter be granted fees?

### **III. Statement of the Case**

**A. This case involves the failure of the trial court to heed this Court's construction of the dissenters' rights provisions in the LLC Act.**

This case arises from Humphrey's dissent from the merger of Clay Street. The "Facts and Procedural History" prior to the mandate are set forth in the Opinion, 170 Wn.2d 498 to 501, ¶¶ 3-9. Humphrey demanded payment for its interest in Clay Street pursuant to the dissenters' rights

provisions of the LLC Act, chapter 25.15 RCW. Clay Street lacked funds to pay Humphrey the fair value of its interest within thirty days of the merger as required by the statute. *Id.* at 499, ¶ 6. Clay Street paid Humphrey over five months late. *Id.* Humphrey disputed Clay Street’s value calculation and filed suit. *Id.* One month later, Clay Street filed a petition to determine the fair value, and the two cases were consolidated to resolve that issue. *Id.*

**B. In the prior appeal, the court of appeals affirmed the trial court’s award of attorney fees against the dissenter (Humphrey) and the denial of fees in favor of the dissenter.**

The trial court determined the fair value of the company and “ordered Clay Street to pay Humphrey an additional \$60,588.22.” *Id.* at 500, ¶ 7. The trial court also found Clay Street violated the LLC Act by failing to pay Humphrey the fair value within 30 days of the effective merger but concluded the company had substantially complied with the Act. *Id.* at 500-01, ¶ 8. “The court also declined to award Humphrey attorney fees as provided under RCW 25.15.480(2)(a) and instead awarded Clay Street and Joseph and Ann Lee Rogel fees under subsection (b) of the same provision based on its finding that Humphrey acted arbitrarily, vexatiously, and not in good faith in pursuing its dissenter’s rights claim.” *Id.* at 501, ¶ 8.

The Court of Appeals affirmed the trial court’s determination of fair value, interest, and its attorney fee award against Humphrey. *Id.* at 501, ¶ 9.

**C. But this Court reversed the rulings regarding fee awards.**

This Court granted review of the ruling that the LLC had substantially complied with the dissenters' rights provisions and also granted review of the fee awards against Humphrey. *Id.* at 501, ¶ 9. Both issues were decided in the dissenter's favor. *Id.* at 507-09.

**1. This Court held the LLC did not substantially comply with the Act.**

The Opinion emphasizes that Clay Street's violation of RCW 25.15.460's requirement to immediately pay the fair value to the dissenter went to the very purpose of the statute. "The purpose of RCW 25.15.460 is to ensure that dissenters have immediate use of the money to which the corporation agrees it has no further claim.... Humphrey did not receive payment within [the statutorily-required] time frame; instead, Clay Street sent the funds almost six months later." *Id.* at 504, ¶ 16 (citation omitted) (internal quotation marks omitted); *id.* at 506, ¶ 17 ("Humphrey did not have anything close to 'immediate' use"). In short, Clay Street's actions were unquestionably "contrary to the underlying purpose of the dissenters' rights statute":

Clay Street plainly failed to pay Humphrey the fair value of its interest in the company within 30 days of the effective merger date as required by RCW 25.15.460. Instead, it partially paid that value six months later. Humphrey was thereby deprived of the immediate use of the fair value of its interest, contrary to the underlying purpose of the dissenters' rights statute. It follows that Clay Street did not substantially comply with the statute. We . . . remand for a determination of whether Humphrey is entitled to attorneys fees under

RCW 25.15.480. As the prevailing party, Humphrey is entitled to attorney fees for this appeal.

*Id.* at 508-09; *id.* at 507, ¶ 20 (noting “the extreme delay of [Clay Street’s] payment to Humphrey” [emphasis added]).

**2. Remand was limited to whether an award of fees to the dissenter (Humphrey) was warranted based on this Court’s holding that the LLC had not substantially complied with the Act.**

This Court issued a very specific “remand for reconsideration of the denial of such fees to Humphrey.” *Id.* at 507, ¶ 20. That this was the sole issue on remand was repeated and emphasized in no less than three subsequent paragraphs of the decision. 170 Wn.2d at 507, ¶ 21; *id.* at 508, ¶ 25; *id.* at 509, ¶ 26.

**3. This Court reversed the fee awards in favor of the LLC and the Rogels as not established by the record.**

The Opinion reversed the awards of fees in favor of Clay Street and the Rogels against Humphrey. *Id.* ¶ 22; *id.* ¶ 25. The Opinion concluded the award was based in part on settlement negotiations in violation of Evidence Rule 408. *Id.* at 507-08, ¶¶ 22-23. The Opinion explicitly held: “Even if the evidence was admitted for a permissible purpose, given the circumstances of this case, **the record does not establish that** Humphrey’s actions were arbitrary, vexatious, or not in good faith.” *Id.* at 508, ¶ 24 (emphases added). Indeed, this Court unequivocally concluded that “[i]f any acts were in bad faith, they were committed by the other

members of Clay Street, who sought to bypass the dissenters' rights statute and section 8.1 of their own LLC agreement ... ” *Id.* The Opinion reversed the fee award on the “untenable grounds” standard. *Id.* ¶ 25.

The Opinion also ruled Humphrey was entitled to attorney fees on appeal as the prevailing party. *Id.* at 509, ¶ 26.

**D. The mandate required compliance with the Opinion and the order denying respondents' reconsideration and clarification motion.**

Dissatisfied with the Opinion, Clay Street and the Rogels filed a reconsideration motion. 2011 CP 46-71. Their motion did not attack the Opinion's ruling that “the record does not establish Humphrey's actions were arbitrary, vexatious, and not in good faith” or the application of the untenable grounds standard to the record. 170 Wn.2d at 508, ¶¶ 24. Rather, they requested reconsideration of the ruling that Humphrey was the prevailing party in the appeal. 2011 CP 50-51, 69-70. They also asked for clarification on remand: (1) that the trial court may consider whether to grant the LLC and members their fees and (2) that Humphrey may not seek fees against the members. *Id.*

This Court denied their motion. 2011 CP 3. Consistent with the denial of the motions, the mandate requires “further proceedings *in accordance with* the attached true copy of the opinion and *the order denying motion for reconsideration.*” 2011 CP 1-3.

This Court subsequently granted a supplemental judgment in favor of Humphrey against “Respondent, Clay Street Associates, LLC, et al., for \$98,191 in appellate fees and costs.” 2011 CP 141-45.

**E. On remand, remarkably, the trial court reinstated the fee awards reversed by this Court, and the trial court failed to grant relief against the other members.**

On remand, Humphrey requested a fee award in its favor, interest on the sums paid, and an award against the individual members.<sup>10</sup> Clay Street and the Rogels on remand filed a motion for the reinstatement of the reversed awards.<sup>11</sup> Humphrey opposed their motion.<sup>12</sup> The trial court awarded Humphrey \$7,479.86 in fees, reinstated the reversed fee award in favor of the Rogels for \$33,533.95 and partially reinstated the award in favor of Clay Street for \$127,607.73. Order at 9:8-14:2, 2011 CP 716-21, App. C. The trial court also denied Humphrey interest on the sum paid and credited to satisfy the reversed fee awards. *Id.* at 12:9-13:5, 2011 CP 695-96, App. C. The trial court did not reach the issue of member liability. Humphrey has appealed from the final judgment and portions of the orders made on remand.<sup>13</sup>

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<sup>10</sup> *See, e.g.*, 2011 CP 32-44, 130-141, 433-38.

<sup>11</sup> 2011 CP 154-66, 423-28.

<sup>12</sup> 2011 CP 391-404; App E (Humphrey’s Post-Hearing Submission at 1); 2011 CP 553-61.

<sup>13</sup> 2011 CP 702-26. Humphrey is not appealing the award of merely \$7,479.86 in fees for Clay Street’s substantial violation of the LLC Act.

#### IV. Summary of Argument

The reinstated fee awards should be reversed for a second time. The reinstatements violate the mandate and the law of the case doctrine. They are clear reversible errors.

The trial court also erred when it failed to grant interest on the sums paid to satisfy the reversed fee awards. The general rule of restitution applies: the beneficiaries of the reversed judgment are liable for restitution. Those beneficiaries are the dissolved LLC and its members who were unjustly enriched by the payment of the reversed awards. The other members were also unjustly enriched from their prior actions bypassing the LLC Agreement and the dissenters' rights statute. The general rule of restitution applies. Remand to the trial court is not necessary on this issue. Further proceedings below would be a waste of resources.<sup>14</sup>

#### V. Argument

##### A. The trial court violated the mandate.

The review of the trial court's compliance with the mandate is a question of law. "The mandate of this court is binding on the superior court, and must be strictly followed. If the superior court fails to enter the judgment or order as directed by the remittitur, it could be compelled to do

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<sup>14</sup> *In re Dependency of A.S.*, 101 Wn. App. 60, 72, 6 P.3d 11 (2000) (when further proceedings "would be a useless act or a waste of judicial resources"); *Radach v. Gunderson*, 39 Wn. App. 392, 398, 401, 695 P.2d 128 (1985).

so.”<sup>15</sup> The Opinion remands precisely one issue: “reconsideration of the denial of such fees to Humphrey.” *See, e.g.*, 170 Wn.2d at 507, ¶ 20. But, over repeated objections and without any analysis, the trial court nullified the Opinion, reinstated the fee awards, and denied the much-delayed and partial remedy for the injuries suffered by the dissenter. Accordingly, the dissenter requests the vacation of the reinstated awards in favor of the other parties.

**1. The Opinion’s plain language does not authorize the reconsideration of possible awards.**

The trial court decided that “the opinion remanded this matter for reconsideration of possible *awards* of attorney’s fees under the facts of this case and RCW 25.15.480.” App. B (Order at 1:20-23 (emphasis added [failing to cite a particular portion of the Opinion for this assertion]), 2011 CP 449). Nowhere does the Opinion remand the “reconsideration of possible *awards*.” *Id.* It directs “reconsideration of the attorney fee award,” singular and more precisely “reconsideration of the denial of such fees to Humphrey.” 170 Wn.2d at 497, ¶ 2; *id.* at 507, ¶ 20; *id.* at 507-509, ¶¶ 22-26. The reconsideration and reinstatement of the reversed *awards* against Humphrey violates the mandate. *Id.* The trial

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<sup>15</sup> *Harp v. Am. Sur. Co. v. N.Y.*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957).

court was required to look to the “specific instructions” and “specific holdings”:

As the Supreme Court observed in *Harp*, we note that the use of the term ‘reconsider’ in our previous opinion was intended to indicate that the superior court would wield some discretionary power in the act of ‘reconsidering,’ but that it must also formulate its decision within the limitations of our specific instructions on remand. In other words, the remand did not open all other possible []-related issues nor could the trial court ignore our specific holdings and directions on remand.”<sup>16</sup>

Here, the trial court offered no explanation or analysis of how the reconsideration of the “possible awards” against Humphrey was consistent with the plain language and this Court’s “specific holdings and directions.” 2011 CP 449.

**2. The Opinion precisely and unambiguously directed the consideration of an award in Humphrey’s favor.**

“Where the direction contained in the mandate of the appellate decision is precise and unambiguous, it is the duty of the court to carry it into execution without looking to change its meaning or direction.” 5 C.S.J. *Appeal and Error* § 1130, at 523 (2007). This Court remanded for consideration of a fee award in favor of Humphrey; it did so in four separate places; those instructions are precise and unambiguous. 170 Wn.2d at 507, ¶ 20; *id.* at 507, ¶ 21; *id.* at 508, ¶ 25; *id.* at 509, ¶ 26.

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<sup>16</sup> *In re Marriage of McCausland*, 129 Wn. App. 390, 399, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

The trial court radically changed the meaning of the “remand for the reconsideration of the denial of fees to Humphrey,” 170 Wn.2d at 507, ¶ 20, when it ruled that “any fees awarded should balance in favor of Clay Street and the Rogels” and reinstated substantial awards in their favor. App. C (Order at 10:5-6, 2011 CP 717).

**3. The clear terms of this Court’s Opinion reveal the complete lack of any direction by this Court to consider an award against Humphrey.**

The crux of this appeal is the Opinion’s ¶¶ 22 to 26. Clay Street and the Rogels argue that “nothing in these paragraph directly” precludes an award in their favor. Resp. to RAP 12.9(a) Mot. at 13. But by any reasonable standard, it is obvious the paragraphs preclude an award in their favor. By any semantic, logical, or legal standard, ¶¶ 22 to 26 foreclose an award of fees on remand to anyone but Humphrey.

Clay Street and the Rogels rely on a sentence in a section of the Opinion’s preface or introduction. 2011 CP 425; 2011 CP 159:8-21 (quoting 170 Wn.2d at 498, ¶ 2). The complete sentence is: “We reverse the Court of Appeals and remand for reconsideration of the attorney fee award.” 2011 CP 159:8-21 (quoting 170 Wn.2d at 498, ¶ 2). They have argued this general statement is a “clear direction” for reconsideration and reinstatement of their fee awards on remand. 2011 CP 159:8-23.

At most, the sentence is barely ambiguous. “Where the mandate is ambiguous or uncertain, the lower court may apply the usual rules of interpretation ...” 5 C.S.J. *Appeal & Error* § 1130, at 522-25 (2007). The canons of interpretation require a construction that reconciles provisions so that all of the language used is given effect, with no portions rendered meaningless or superfluous, and giving greater weight to specific and exact provisions than to the general language.<sup>17</sup> Therefore, ¶ 2’s sentence must be construed in the context of the more specific and repeated directions in the ANALYSIS and CONCLUSION sections of the Opinion. 170 Wn.2d at 501-08, ¶¶ 10-25 (“ANALYSIS”); *id.* at 508-09, ¶ 25 (CONCLUSION).

If this Court had intended to remand the consideration of a fee award against Humphrey and in favor of the other parties, there would have been a specific direction in ¶¶ 20-26. There were four specific instructions for consideration of an award in favor of Humphrey—not against Humphrey. The first instruction is extremely specific: “We reverse the Court of Appeals and remand for reconsideration of the denial of such fees to Humphrey.” *Id.* at 507, ¶ 20. This remand of a single issue was repeated and emphasized in no less than three subsequent paragraphs

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<sup>17</sup> *Gorman v. Garlock*, 155 Wn.2d 198, 210-11, 118 P.3d 311 (2005) (statutory construction); *accord, Alder v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004) (specific and exact terms are given greater weight than general language, when construing a contract); *see generally* 5 C.S.J. *Appeal & Error* § 1130, at 522-525 (2007) (“general rules of legal construction” apply to mandates).

of the decision. 170 Wn.2d at 507, ¶ 21 (“We remand for further proceedings to determine whether, given Clay Street’s failure to substantially comply with the LLC Act, an award of fees to Humphrey is appropriate.”); *id.* at 508, ¶ 25 (“We remand for consideration of whether, in light of Clay Street’s failure to substantially comply with the statute, Humphrey is entitled to attorney fees.”); *id.* at 509, ¶ 26 (“We reverse . . . and, in light of that reversal remand for a determination of whether Humphrey is entitled to attorney fees under RCW 25.15.480.”). The express mention of a single remanded issue supports the implied exclusion of any other issue that is not expressly mentioned.

Clay Street and the Rogels have asserted the sentence in ¶ 2 (“remand for reconsideration of the attorney fee award”) “is the *only* paragraph where the Supreme Court addressed the remedy for [the trial court] having relied on ‘untenable grounds’ in awarding fees to Clay Street . . . , the Supreme Court ordered a ‘remand for reconsideration of the attorney fee award.’ 170 Wn.2d at 497-98.”<sup>18</sup> But their argument rests on the false assumption that there is a remedy in the trial court. There was no reason to remand the issue of a fee award against Humphrey due to the dispositive rulings in ¶¶ 24-25.

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<sup>18</sup>2011 CP 425:7-17; 2011 CP 159.

**4. The express holding in ¶ 24 that the record fails to establish Humphrey’s liability shows that the trial court had no authority to reconsider Humphrey’s liability.**

Clay Street’s and the Rogels’ position, which was adopted by the trial court, is that the trial court on remand could review the admissible evidence and reinstate the award against Humphrey.<sup>19</sup> But Humphrey had placed front and center before the trial court the Opinion’s broad ruling in ¶ 24. 170 Wn.2d at 508, ¶ 24.<sup>20</sup> The plain language in ¶ 24 is unequivocal and unconditional: “Even if the evidence was admitted for a permissible purpose, given the circumstances, the record does not establish Humphrey’s actions were arbitrary, vexatious, or not in good faith.” (Emphasis added.) The “even if clause” reinforces the breadth of the categorical statement that the record was insufficient to support an award *even if* the improper evidence were permitted. *Id.*

Paragraph 24 is wholly unnecessary if this Court’s intention had been to remand the consideration of the fee award against Humphrey under RCW 25.15.480.2(b), § 2(b). Also, ¶ 24’s second sentence (“If any acts were in

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<sup>19</sup> Compare Mot. for Attorneys Fees at 10:17-20 (italics added), 2011 CP 163 (“What the Supreme Court did was reverse the prior fee award (because it was *based in part* on untenable grounds) and grant Humphrey ... a remand in which [the trial court] considers whether based on appropriately considered evidence, Humphrey’s conduct warrants an award ....”) with Order at 9:14-24 (“The Supreme Court found the awards were *based partly* on inadmissible evidence, ... In reviewing the trial evidence, the court recalls that quite apart from the evidence found inadmissible by the Supreme Court, there was significant other evidence that indicated Humphrey acted “arbitrarily, vexatiously or not in good faith ....”) (italics added), App. C, 2011 CP 693.

<sup>20</sup> Humphrey’s Opp’n to Clay St.’s Mot. for Fees at 9:14-10:9, 2011 CP 414-15.

bad faith, they were committed by the other members ...”) would be not only superfluous but also nonsensical, since it supports a finding of § 2(b) liability against the other members of the dissolved LLC – not against the dissenter.

In addition, ¶ 24’s sweeping and categorical language was necessary to overrule the Court of Appeals’ broad holding that: “We nevertheless uphold the finding that Humphrey acted vexatiously **because the rest of the evidence amply supports it.**”<sup>21</sup> Paragraph 24 overruled the Court of Appeals opinion, an opinion which had relied in part on Humphrey’s initial value of “\$4.1 million” and the refusal to dismiss “Joseph and Ann Lee Rogel” from the suit, as grounds for affirming the fee award against Humphrey.<sup>22</sup>

The breadth of ¶ 24’s holding also mirrors the issues argued by the parties in their briefs. Humphrey’s Supplemental Brief to this Court challenged the sufficiency of the *admissible* evidence arguing “[t]he conclusion that Humphrey acted ‘vexatiously’ is contrary to law and unsupported by the record.”<sup>23</sup> Meanwhile, Clay Street and the Rogels

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<sup>21</sup> Unpublished Decision (Dec. 8, 2008) at 14, 2011 CP 205.

<sup>22</sup> *Compare* Unpublished Dec. at 15, 2011 CP 205-06, *with* 170 Wn.2d at 507, ¶ 20 (“The Court of Appeals affirmed on both issues. We reverse the Court of Appeals and remand for reconsideration of the denial of fees to Humphrey.”)

<sup>23</sup> 2011 CP 290-93; 2011 CP 291-92.

conceded that the record was sufficient and that remand “was clearly unnecessary.”<sup>24</sup>

Respondents’ argument on remand rested on three claims: (1) Humphrey had not assigned error to the trial court’s §2(b) finding, (2) this Court had not reviewed the record since reviewing courts do not “examine the adequacy of the record unless a factual finding has been challenged,” and (3) nothing in ¶¶ 24 and 25’s “language mandates against any § 2(b) award to Clay Street or the Rogels,”<sup>25</sup> Each of those claims was mistaken.

First, Humphrey assigned error to the fee award. Assignment 2 states: “the trial court erred when it granted Clay Street and Joseph and Ann Lee Rogel fees, costs, and expenses pursuant to RCW 25.15.480.” Issue Pertaining to the Assignment of Error 6 states: “Did Humphrey act arbitrarily, vexatiously or not in good faith with respect to the statutory rights of Clay Street and the Rogels?” 2008 Appellant’s Revised Br. at 2-3.

Second, this Court reviewed the § 2(b) findings. The Opinion’s ¶ 9 states: “Humphrey objects first to ..., second, to the court’s finding that

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<sup>24</sup> Resp’ts’ Supplemental Br. at 19 (“The trial court’s reliance on such a wealth of evidence . . . provides ample support for the trial court’s finding” and arguing a full and fair opportunity to litigate), 2011 CP 422.

<sup>25</sup> Resp’t Answer to Pet’r’s RAP 12.9(a) Mot. at 13 (quoting ¶¶ 24-25); *id.* at 14-15 (arguing no assignment of error “to the trial court’s arbitrary, vexatious, and, not in good faith finding” and quoting *Govett v. First Pac. Inv. Co.*, 68 Wn.2d 973, 413 P.2d 972 (1966) for the proposition that there is review only of challenged findings).

Humphrey acted arbitrarily, vexatiously, not in good faith. .... We limit our review to these two concerns ....” 170 Wn.2d at 501, ¶ 9. The Opinion’s ¶¶ 24-25 addresses those statutory findings. *Id.* at 508, ¶¶ 24-25. Therefore, the record squarely refutes the claim that this Court had not reviewed the findings.

Third, the “findings” required by § 2(b) were the proper subject of appellate review and the Opinion’s ¶¶ 24-25 preclude an award against Humphrey under § 2(b). RCW 25.15.480(2)(b) authorizes a fee award against the dissenter “if the court *finds* that the party ... acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.” Applying this statutory standard to the facts is a question of mixed law and fact which can be decided on appeal. *See, e.g., Tapper v. State Empl’t Sec. Dep’t*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993) (“The process of applying the law to the facts ... is a question of law ...”). This Court has the inherent authority to consider the merits of the case. *See* RAP 12.2.

This Court reversed the fee awards against Humphrey even under the highly deferential abuse of discretion standard of review. 170 Wn.2d at 506, ¶ 18. This Court will reverse “a trial court’s decision under this standard only if it ‘is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons,’ with the last category including errors of

law.” *Id.*<sup>26</sup> “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

This Court “reverse[d] the fee awards against Humphrey and in favor of the other parties, based as it was on untenable grounds.” *Clay St.*, 170 Wn.2d at 508, ¶ 25. That means this Court found that the fee awards against Humphrey rested on “facts unsupported in the record.” *Compare* 170 Wn.2d at 508, ¶ 24 (“the record does not establish that Humphrey’s actions were arbitrary, vexatious, and not in good faith”) *with Rohrich*, 149 Wn.2d at 654 (“A decision is based on ‘untenable grounds ... , if it rests on facts unsupported in the record ... ’”).

As a result, this Court reversed the trial court and the Court of Appeals by unequivocally holding that “the record does not establish Humphrey’s actions were arbitrary, vexatious, and not in good faith.” 170 Wn.2d at 508 ¶ 24. See RCW 25.15.480(2)(b) (providing the statutory elements for a fee award “if the court *finds* that the party ... acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.” [Italics added]).<sup>27</sup> This Court’s holding on Humphrey’s lack of

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<sup>26</sup> 170 Wn.2d at 506, ¶ 18 (citing *Noble v. Safe Harbor Family Preserv. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009)).

<sup>27</sup> *Accord, Miebach v. Colasurdo*, 102 Wn.2d 170, 175-77, 685 P.2d 1074 (1984) (stating (continued . . . ))

liability under § 2(b) was not tentative, ambiguous, partial, or open to revision. As explained below, this Court's holding was binding on the trial court and precluded the reinstatement of the reversed fee awards.

**5. The trial court's order violates the state constitution, law of the case doctrine, and RAP 12.2.**

Respondents on remand basically invited the error that required this second appeal. Their reconsideration motion asked for clarification from this Court so each could advance reasons for reinstating their RCW 25.15.480(2)(b) awards on remand. 2011 CP 55, 62, 68-70. After this Court denied their motion, they told the trial court that the denial meant:

The Supreme Court confirmed that the determination as to the impropriety of certain reasons relied upon by this Court in awarding statutory fees and costs in no way limit this Court's statutory duty to consider all allowable evidence to decide whether that allowable evidence supports a finding that Humphrey acted arbitrarily, vexatiously, or not in good faith. Any other result would infringe upon Clay Street's and the Rogel's statutory right to seek fees and costs under RCW 25.15.480 and infringe upon the Legislature's broad grant of discretion to trial courts considering such requests.<sup>28</sup>

In effect, they asked for the nullification of the Opinion; they stated that this Court's "determination ... in no way limits [the trial court]'s statutory duty" and "infringe[s] Clay Street's and the Rogels' statutory rights to seek fees."<sup>29</sup>

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(. . . continued)

bona fide purchaser status is a question of mixed law and fact).

<sup>28</sup> Clay St. Assoc.'s and Joseph and Ann Lee Rogel's Mot. for Attorney Fees and Costs. at 6:17-7:7 (underline added), 2011 CP 159-60

<sup>29</sup> *Id.*

The trial court adopted their flawed analysis and made three fundamental and independent errors.

First, the trial court failed to address the constitutional restriction: “Decisions of this court are not subject to review by the superior court. Const. art. 4, §§ 4, 6.” *Darrell E. Lee Law Office*, 99 Wn.2d 270, 274, 661 P.2d 136 (1983), 2011 CP 409-10. This Court has inherent authority to consider issues that are necessary for a proper and final resolution of the case.<sup>30</sup> The trial court did not have free reign to pick and choose among “the issues presented on appeal and unchallenged findings” as advocated by respondents while ignoring the specific rulings in the Opinion’s ¶¶ 24-25.<sup>31</sup>

Second, the trial court failed to address the law of the case doctrine: Black letter law dictates that “[t]he appellate court’s decision became law of the case and superseded the trial court’s finding on every issue the appellate court decided.” *State v. Strauss*, 119 Wn.2d 401, 412, 832 P.2d 78 (1992), 2011 CP 406:17-19. The Opinion explicitly rules: “If any acts were in bad faith, they were committed by the other members of Clay Street ...” *Clay St.*, 170 Wn.2d at 508, ¶ 24. Clay Street attacked this ruling as having no effect on remand: “the Supreme Court’s comment about which party acted more vexatiously ... is clearly dictum that in no

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<sup>30</sup> *Shoreline Cmty. Coll. Dist. v. Emp’t Sec. Dep’t*, 120 Wn.2d 394, 402, 842 P.2d 938 (1992), 2011 CP 414:16-18.

<sup>31</sup> Resp’ts’ Answer to Pet’rs RAP 12.9(a) Mot. at 16.

way limits this Court's analysis." 2011 CP 427. Yet, as another state supreme court concluded: "It is not for the [trial court] to answer that this court's opinion is any part dictum and of no bearing on its mandate."<sup>32</sup> Here, the appellate court decided the record did not establish a finding for § 2(b) and that was the law of the case.

Third and finally, the trial court failed to address the RAP 12.2. RAP 12.2 generally provides: "the action taken or made by the appellate court is effective and binding ... and governs all subsequent proceedings in the action ... unless otherwise directed upon recall of the mandate ..." The Opinion had already "reverse[d] the trial court's award of attorney's fees against Humphrey and in favor of the other parties, based as it was on 'untenable grounds.'" 170 Wn.2d at 508, ¶ 25. Moreover, the Opinion adversely ruled the record did not establish the elements necessary for such an award. *Id.* at 508, ¶ 24 (arbitrary, vexatious, or not in good faith). The reinstatement of the reversed awards and ruling Humphrey acted arbitrarily, vexatiously, and not in good faith was an impermissible "challenge of an issue already decided by the appellate court," violating RAP 12.2. RAP 12.2; App. C (Order at 10:3-7, 10:26-27, 11:4-12:2, 2011 CP 717-18).

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<sup>32</sup> *Union Trust Co. of Indianapolis v. Curtis*, 186 Ind. 516, 525, 116 N.E. 916 (1917); *Kolatch v. I. Rome & Sons*, 137 Wash. 268, 270, 242 P. 38 (1926) (stating in the context of a reversal of a judgment without instructions, "in this jurisdiction, the effect of such a reversal is to be determine from the whole Opinion, and usually that is not difficult.").

In summary, the trial court's reinstatement of the fee awards against Humphrey was a violation of constitutional law, the common law, and procedural law. The reinstated awards should be reversed. The trial court made two additional reversible errors. The trial court failed to grant restitutionary interest and failed to require the other members to pay restitution to Humphrey.

**B. The denial of interest on moneys paid to satisfy the reversed judgments was an abuse of discretion.**

When a party satisfies a decision which is modified by the appellate court, RAP 12.8 authorizes the trial court to restore to the party any property taken. Humphrey requested the restoration of the money that had been paid to satisfy the reversed awards (\$220,959)<sup>33</sup> plus interest.<sup>34</sup> The trial court's denial of interest is reviewed for an abuse of discretion.<sup>35</sup> The denial of interest rests on two untenable reasons: (1) the sum was not liquidated and (2) interest is not appropriate when a judgment is reversed. 2011 CP 719:6-720:5. The denial of interest should be reversed, and

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<sup>33</sup> In 2007, Humphrey satisfied the fee awards by making payments to Clay Street (\$187,718 = \$184,343 for attorney fees + \$3,375 expert fees) and to the Rogels (\$33,241). Order (Oct. 17, 2007), 2011 CP 247, Final J. (Sept. 13, 2011), 2011 CP 724-25. The total payments were \$220,959.

<sup>34</sup> 2011 CP 35-36, 135, 139-140.

<sup>35</sup> See, e.g., *Scoccolo Constr., Inc. ex rel Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006) (abuse of discretion standard applies to decisions regarding prejudgment interest); *Ehsani*, 160 Wn.2d at 589 (2007) (abuse of discretion standard applies to RAP 12.8's remedy).

Court should exercise its inherent authority and power to direct the award of 12 percent interest from the date of the payments.<sup>36</sup>

**1. The sum is liquidated.**

On remand, “Humphrey argue[d] that the post-trial award of fees ... is a liquidated sum to which he is entitled on remand, entitling him to prejudgment interest.” App. C (Order at 12:21-24, 2011 CP 719).<sup>37</sup> The trial court, however, erroneously concluded the sum was not liquidated: “In this case, before this Court can consider prejudgment interest, a number of variables remained to be decided” and “[a]s previously noted, simply reversing the fees previously awarded to Clay Street and the Rogels would not be a reasonable exercise of discretion by this Court.” *Id.* at 12:14-6, *id.* at 12:27-13:2, App. C, 2011 CP 719-20.

The denial was for an “untenable reason” — the erroneous construction of the mandate as granting the discretion to reinstate the reversed awards—an error of law. 170 Wn.2d at 507, ¶ 21 (quoting *Noble*, 167 Wn.2d at 17). Once this Court had made the binding decision reversing the fee awards, the awards were no longer subject to modification. They

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<sup>36</sup> Restatement of Restitution § 74 cmt. a (“The reversing tribunal can itself direct restitution either with or without conditions ...”). Until 1957, a statute provided for a writ of restitution either by the supreme court or the court below to remedy a reversed judgment. *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 45, 802 P.2d 1353 (1991) (RCW 4.88.240 is predecessor to RAP 12.8); *Singly v. Warren*, 18 Wash. 434, 437, 51 P. 1066 (1898) (construing stating “[t]he successful appellant is entitled to restitution from respondent ...”); *accord*, Const. Art. 4, § 4; RCW 2.04.020.

<sup>37</sup> 2011 CP 35-36, 560.

were fixed sums. 170 Wn.2d at 508, ¶ 25 (“We reverse the trial court’s award of fees against Humphrey ...”). The payments made by Humphrey were also fixed sums. The denial of interest on these fixed sums was an abuse of discretion. The trial court compounded this error with further errors.

**2. Interest accrues from the date of the satisfaction of the reversed judgment.**

Separate from the erroneous construction of the mandate, the trial court committed additional errors. The trial court relied on an “untenable reason” for the denial of interest and “applied the wrong legal standard,”<sup>38</sup> when it ruled “interest is not appropriate where an appellate court reverses a trial court judgment ...”<sup>39</sup>

**a. The fair value award was never modified.** This case does not fit neatly within the rule governing the accrual of interest on a reversed judgment where the judgment was never satisfied as in the *Fisher Properties* line of decisions.<sup>40</sup> Even within that rule, there is “a gloss to situations where an appellate court reverses the award by distinguishing between

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<sup>38</sup> *Noble*, 167 Wn.2d at 17 (untenable reasons includes errors of law); *In re Guardianship of Lamb*, 173 Wn.2d 173, 189, 265 P.3d 876 (2011) (untenable reasons includes decision “reached by applying the wrong legal standard.”) (citation omitted).

<sup>39</sup> App. C (Order at 13:1-5 (citing *Fulle v. Boulevard Excavating, Inc.*, 25 Wn. App. 520, 522, 610 P.2d 387 (1980)), 2011 CP 696).

<sup>40</sup> *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 373-74, 798 P.2d 799 (1990).

modification and vacation.”<sup>41</sup> Where an appellate court merely modifies the trial court award and the only action necessary in the trial court is compliance with the mandate, interest runs from date of the original judgment.<sup>42</sup>

Here, the fair value award was never modified. As Humphrey asserted below: “The law of the case is that Humphrey is entitled to the repayment of [the amounts of the reversed awards]. Because the amounts are liquidated, interest must be awarded from November 2007, when Humphrey paid the judgments and when the court credited the fair value sum that was never paid to Humphrey. Humphrey has been out of pocket these amounts for almost four years.” 2011 CP 560:11-15.

The denial of interest on the fair value award directly conflicts with the prior Opinion’s construction of the dissenters’ rights statute. The statute requires interest to accrue on fair value award from the date of the merger.<sup>43</sup> The interest remedy is an essential element of the statutory remedy to compensate the dissenter for taking its property.<sup>44</sup> The compensation is

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<sup>41</sup> 2011 CP 134:5-6 & n.4 (arguing exception when only action necessary in trial court is compliance with mandate, then interest runs from the date of the original judgment); 2011 CP 140:1-21 (same).

<sup>42</sup> 2011 CP 140 (citing *Fulle*, 25 Wn. App. at 522-23).

<sup>43</sup> RCW 25.15.425(4) (defining interest “from the effective date of the merger until the date of payment, ...); RCW 25.15.475(6) (“dissenter ... is entitled to judgment for ... the fair value of the dissenter’s membership interest ... , plus interest ...”).

<sup>44</sup> *China Prods. N. Am. v. Manewal*, 69 Wn. App. 767, 773, 850 P.2d 565 (1993) (“An appraisal is the method of paying a shareholder for taking his property; it is the statutory means whereby a shareholder can avoid the conversion of his property into other property (continued . . . )

intended to give the dissenter “immediate use of the money.” 170 Wn.2d at 505 n.9 (citation omitted). The interest award is a partial and much delayed remedy for the extremely tardy payment of that money. The Opinion in this case holds the LLC’s “extreme delay” in paying the dissenter was a substantial violation of the statute and required a remand for reconsideration of whether the dissenter was entitled to a fee award.<sup>45</sup>

The Opinion separately reversed the fee awards against the dissenter.<sup>46</sup> If those reversed awards had not been entered in the first place, then the dissenter would have received a \$60,588.22 judgment for the fair value award plus interest accruing from the effective date of the merger. 170 Wn.2d at 500, ¶ 7 (\$60,588.22). The denial of interest on that sum was an abuse of discretion. The denial of interest on the other sums was a further abuse of discretion.

**b. Clay Street and the other members were unjustly enriched from the satisfaction of the reversed judgment.** The reversed judgment after deducting the fair value award was a net judgment of \$123,754.78 to Clay Street. Humphrey paid both that judgment and the judgment in favor of the Rogels.<sup>47</sup> After this Court reversed those awards,

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(. . . continued)

not of his choosing.”) (citation omitted).

<sup>45</sup> 170 Wn.2d at 507, ¶¶ 20-21.

<sup>46</sup> 170 Wn.2d at 508, ¶¶ 24-25.

<sup>47</sup> Final J. for Def. Clay St. Assocs., LLC and Joseph and Ann Lee Rogel at 3:14-18, 2007  
(continued . . .)

Humphrey requested on remand the award of interest on the amounts previously paid to satisfy both judgments which had been reversed on appeal. Humphrey invoked the general principle that one who retains money should be charged interest on it for the “use value” of the sum.<sup>48</sup> Humphrey argued that the interest accrues at 12 percent:

Clay Street and its members invoked the very same 12 percent interest rate in the first judgment. They have retained the use of almost \$ ... They ought to be charged interest on the sum that Humphrey promptly paid ... years ago. *See Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 50, 169 P.3d 473 (2007) (affirming award of prejudgment interest to a class of state employees who sought to recover overtime compensation under state minimum wage act was essentially a claim for implied contract or unjust enrichment ...). (Emphasis added).<sup>49</sup>

While Humphrey below invoked the general principle that an award of interest is the remedy for the retention of money, there is well-established law applying that principle, when a satisfied judgment is subsequently reversed.<sup>50</sup> The unjust enrichment of the judgment creditors “who were the beneficiaries of the trial court’s error” creates a disgorgement remedy in favor of the judgment debtor under the law of restitution.<sup>51</sup> Interest is part of

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( . . . continued)

CP 2353:14-20.

<sup>48</sup> *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 30 P.2d 662 (1986); 2011 CP 35:21-23.

<sup>49</sup> Proposed Partial Supplemental J. for Humphrey Indus. Ltd. on the Reversed Fee Awards and Costs, and Expenses and Fees Awarded on Appeal at 3:26-4:8, 2011 CP 139-40; Humphrey’s Mot. for Partial J. at 4:13-5:8 (requesting disgorgement of funds paid plus interest and citing *Stevens*), 2011 CP 35-40.

<sup>50</sup> Restatement of Restitution § 74 at 302-03.

<sup>51</sup> *Ehsani*, 160 Wn.2d at 595 (quoting *Atl. Coast Line R.R. Co.*, 295 U.S. 301, 309, 55 S. Ct. 713, 79 L. Ed. 1451 (1935)).

the restitution.<sup>52</sup> Money has a time value; interest is necessary to restore partially the status quo ante to the dissenter.<sup>53</sup>

Clay Street benefitted from the satisfaction of the judgment. Early in this case, Clay Street conceded that its sole asset had been sold, “and nearly all of the proceeds were dissipated ... A relatively small sum from the proceeds is being held in the [law firm] trust account pending resolution of the actions ....”<sup>54</sup> The trial court required the LLC to give notice before disbursing the remaining proceeds. 2007 CP 261. The final disbursement of those proceeds was seven months before trial.<sup>55</sup> After trial, Clay Street owed over \$148,828 in legal fees, some of which was already five months past due.<sup>56</sup> When Humphrey satisfied those fee awards, Clay Street and its members were directly benefitted.

In summary, Clay Street and its members were the beneficiaries of the erroneous rulings granting them fee awards. Humphrey lost the use of the

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<sup>52</sup> *A.N.W Seed*, 116 Wn.2d at 47; Restatement of Restitution § 74 cmt. d (1937) (“the payor is entitled to receive from the creditor the amount with interest....”); 1 Restatement (Third) of Restitution and Unjust Enrichment § 18 cmt. h (2011) (stating presumption of interest on moneys paid to satisfy judgment from date of payment).

<sup>53</sup> “While Humphrey was paid on a \$2.5 million fair value which [the trial court] later adjusted to \$3.1 million, the property was resold in April 2008 for \$4.85 million the year after trial.” Decl. of David Spellman in Supp. of Humphrey’s Mot. for Fees ¶ 6, 2011 CP 658.

<sup>54</sup> 2007 CP 241:19-25 n.1.

<sup>55</sup> App. D (Ex G to Decl. of David Spellman in Support of Fees and Costs (Dkt. 435).

<sup>56</sup> McNaul Ebel Nawrot & Helgren PLLC Draft Bill 52860 (\$148,828 now due, no payments, no retainer, amounts due for 30 to over 151 days, summary of costs and fees after Oct. 27, 2006), Ex. M to Decl. of Gregory G. Schwartz in Supp. of Defs.’ Mot. for Award of Fees and Costs, 2007 CP 3355.

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funds paid to satisfy those reversed awards. The trial court on remand abused its discretion when it denied interest on the sums. The trial court gave the other members a gift—the free use of \$220,959 over four years. That gift is contrary to the letter and spirit of the Opinion in the prior appeal, the dissenters’ rights statute, and the presumption of restitution (including interest) from litigants who were the beneficiaries of the error by the trial court. There is no basis for the denial of interest on this record.<sup>57</sup>

The denial of interest was an abuse of discretion. For these reasons, this Court should direct restitution from Clay Street of \$187,718 and from the Rogels of \$33,241 along with 12 percent interest accruing from November 2007, when these amounts were paid.<sup>58</sup> The unjust enrichment extends well beyond the reversed fee award.

**C. The dissenter should be granted relief to avoid the unjust enrichment of the other members who bypassed the LLC Agreement and dissenters’ rights statute.**

Although the trial court did not reach the issue of member liability for the reversed fee awards and other awards,<sup>59</sup> the appellate determination

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<sup>57</sup> Cf. *Colonial Imports v. Carlton NW, Inc.*, 83 Wn. App. 229, 242-48, 921 P.3d 575 (1996) (affirming suspension prejudgment interest where party pressed a position having no reasonable possibility of withstanding appellate scrutiny).

<sup>58</sup> See *supra* n.33 (sources for dollar amounts); see also Final Judgment (granting 12 percent interest), 2007 CP 2353.

<sup>59</sup> 2011 CP 43-44 (identifying respondents and inactive status of LLC), 2011 CP 140 (LLC inactive); App. E at AX 244 (Humphrey Indus. Ltd.’s Post-Hearing Submission at 2:8-18 & nn.1-2); App. E at AX 288-309 (compilation entitled, “Fee Award to Rogels Was Litigated on Appeal As Was the Theories of Liability Against the Individual Members”); Reply in Supp. of Humphrey’s Mot. for Partial Summ. J. at 5:7-18, 2011 (continued . . .)

of this issue is necessary for a proper resolution of the case and will preserve both judicial and private resources.<sup>60</sup>

The issue of member liability was briefed in the trial court when Humphrey asked for interim relief early in the case<sup>61</sup> and later when Joseph and Ann Lee Rogel brought their fee request claiming they were merely members of the LLC and should never have been named as parties in the suit.<sup>62</sup> The issue was briefed again during the prior appeal that resulted in this Court reversing the fee award made in favor of the Rogels.<sup>63</sup> The issue was briefed once more on remand.<sup>64</sup> Since the dissolved LLC has not satisfied the judgment and the issue is fully briefed, the issue is ripe for resolution. Without very specific appellate relief, the dissenter remains in a “twilight zone,”<sup>65</sup> contrary to the purpose of the dissenters’ rights statute. If the remedy of member liability is not decided on review, then the unresolved remedy is an independent ground for transferring the case to another judge on remand. *See infra* V F at pages 45-47.

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(. . . continued)

CP 135.

<sup>60</sup> *Shoreline Cmty. Coll. Dist.*, 120 Wn.2d at 402, 2011 CP 400:16-18; *see* RAP 12.2; RAP 1.2(a).

<sup>61</sup> 2007 CP 46-47, 254-57, 329-30.

<sup>62</sup> 2007 CP 1947:13-17; 1996-2001; 2004.

<sup>63</sup> App. E at AX 291 (Appellant’s Revised Br. at 38-39 n.63 (2008)), App. E at AX 299-300 (Appellant’s Revised Reply Br. at 18-20 (2008)).

<sup>64</sup> *See, e.g.*, App. E at AX 244 (Humphrey’s Post-Hearing Submission at 2:11-26).

<sup>65</sup> 2007 CP 1644:14-1645:14 (quoting 2 Senate Journal, 51st Leg. at 3086-87) (purpose of the statutory scheme was to not leave the dissenter in a twilight zone where dissenter has lost former rights but not has not yet gained new ones).

In the prior appeal, Humphrey demonstrated that the trial court had committed an error of law when it concluded Humphrey acted “arbitrarily, vexatiously or not in good faith” regarding the Rogels and when it granted a fee award in their favor. 2007 Order at 12 (citing RCW 25.15.480(2)(b), 2011 CP 246. Humphrey’s briefing explained why all the members of Clay Street had been joined in the suit: “At the time this suit was filed, Clay Street was an administratively dissolved company which had liquidated and distributed substantially all of its assets to the non-dissenting members. The members who received the liquidation distributions hold the funds in trust subject to creditor claims such as HI,” (Humphrey Industries). App. E at AX 291 n.63 (Br. of Appellant) (citation omitted). The LLC “violated RCW 25.15.235(1) (limiting distributions to the members) and a statutory/constructive trust attached to the past due funds owed to Humphrey, when the other members were paid first and without making a ‘fair value’ calculation.” App. E at AX 300 n.45 (Appellant’s Revised Reply Br. at 19). “RCW 25.15.235(2) imposes statutory liability on the members, while its ‘other applicable law’ provision preserves common law claims against the other members for constructive trust, breach of fiduciary duty, and piercing the corporate veil.” *Id.*

Invoking those same grounds on remand, Humphrey asserted the other members were liable for the reversed fee awards, the supplemental

judgment, and any further awards. “Since the inception of this suit, Clay Street has been an inactive company whose assets had been directly transferred to its members and all funds were liquidated in November 2006. With those transfers went the attendant liability that flows to the individual members ...” App. D (Humphrey’s Mot. for Fees at 12:11-14 (Dkt. 434). “Humphrey asserted statutory and common law claims and remedies against the individual members since the company was dissolved, the other members paid first and before Humphrey. *See, e.g.,* Appellant’s Revised Br. at 19 n.45.”<sup>66</sup>

The controlling rule is: “The right of the dissenters to payment takes precedent over the right of other shareholders to distribution.”<sup>67</sup> “It is well-settled that a creditor of a corporation can satisfy his claim against a corporation out of assets distributed to a shareholder upon distribution.” *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 360, 662 P.2d 385 (1983), 2007 CP 329:7-8 & n.25-26. That rule applies in this case, where each of the other members received a preferential distribution before the dissenter was paid.<sup>68</sup>

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<sup>66</sup> App. E at AX 244:11-18 & nn. 1-2 (*Humphrey Indus. Ltd.’s Post-Hearing Submission* citing *Green v. McAllister*, 103 Wn. App. 452, 468-69, 14 P.3d 795 (2000)).

<sup>67</sup> Reply in Supp. of Partial Summ. J. and Other Relief at 3:5-6 & n.6, 2007 CP 329; *Id.* (citing 12B *Fletcher Cyclopedia of the Law of Private Corporations* § [5]906.90 at 382 (2000 rev. ed.); *see also Flarsheim v. Twenty-Five Thirty-Two Broadway Corp.*, 432 S.W.2d 245, 253 (Mo. 1974).

<sup>68</sup> 5/16/05 Chicago Title Ins. Co., Seller’s Settlement Statement (showing direct payments to the members, ABO Investments and the Rogels), 2007 CP 284; Decl. of George Humphrey in Supp. of Pl.’s Mot. for Injunctive Relief and Summ. J. ¶ 32 (payments to members were \$277,014 while the dissenter received \$181,193), 2007 CP 46-47.

RCW 25.15.155(1) does not absolve the other members from liability. 2007 CP 329 n.3. RCW 25.15.155(1) restricts member liability unless the act constitutes gross negligence, intentional misconduct, or knowing violation of the law. Here, the other members acted despite a known risk that their conduct violated the rights of the dissenter.<sup>69</sup> The disclosure of that risk is memorialized in a memorandum to one of the managing members. Trial Ex. 28, 7/24/2004 Mem. To Gerry Ostoff (LLC Merger Procedure stating “the company must tender payment of the value of the interest, plus interest ... within 30 days after the merger becomes effective.”) *Id.* (“if payment is demanded, the company will engage an appraiser.”).<sup>70</sup>

Also RCW 25.15.155(2) imposes independent liability for “the members to ‘account’ and ‘hold as trustee’ for the company for any profits or benefits derived without the consent of the majority of disinterested members ...” 2007 CP 329 n.3. That liability requires the other members to hold in trust the preferential distributions. They also hold in trust the benefits from taking a “six-month deferral of payment” to the dissenter, which was “not substantial compliance with a statute that unambiguously requires payment ‘within thirty days.’” 170 Wn.2d at 506, ¶ 17.

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<sup>69</sup> 2 Restatement (Third) § 51(3) (defining a “conscious wrongdoer” as a defendant enriched by misconduct and who acts “despite a known risk that the conduct in question violates the rights of the claimant.”)

<sup>70</sup> App. D (Humphrey’s Mot. for Fees at 7:18-21 (Dkt. 434) (quoting trial exhibit 28)).

The other members further violated the separate restrictions that RCW 25.15.235 imposes on distributions. They cannot establish the two-part solvency test necessary to authorize the distributions. RCW 25.15.235(1) (liquidity and balance sheet requirements). In response to the trial court's order, they provided an income statement reflecting the LLC's inability to pay debts as they became due. 2007 CP 259-60. They failed to provide a financial statement reflecting the company's positive net fair value (assets less liabilities) at the time of the distributions. 2007 CP 257:1-5, 259.

This Court previously ruled that the other members bypassed the LLC Agreement and the dissenters' rights statute.<sup>71</sup> While they were bypassing these requirements, the other members were unjustly enriched in three substantial ways: (1) during the six-month delay in payment in violation of the dissenters' rights statute, 170 Wn.2d at 509, ¶ 26, they used company funds, property, and information and the dissenter's interest;<sup>72</sup> (2) they made preferential distributions to themselves of \$277,019; and

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<sup>71</sup> 170 Wn.2d at 508, ¶ 24 (“the other members of Clay Street who sought to bypass the dissenters' rights statute and section 8.1 of their own LLC Agreement ...”)

<sup>72</sup> Finding No. 12 (Aug. 29, 2007) (finding “errors in the merger process in that the Bank of America's consent was not obtained, a new identification # was not obtained and Mr. Humphrey was neither timely informed or paid as required by statute”), 2011 CP 179. “Gerry Ostroff's intention was to have Clay Street pay for Mr. Cowan [the attorney who implemented the merger] legal expenses. ... Gerry Ostroff later sent George Humphrey an email that stated ‘legal fees ... will show up in the financials.’ [Trial] Ex. 40.” 2007 CP 1633 n.2 (citations omitted). The attorney invoices for the merger approximated the company's legal expenses. Trial Ex. 113 (\$2339.82 attorney invoices through Nov. 30, 2004); Income Statement (12/31/04) (\$2,230.55 in legal expenses). “[T]here is circumstantial evidence that company funds were converted to the use of the new company which had been capitalized with only \$3.” 2007 CP 2523:14-15.

(3) they benefitted from the \$220,959 payment by the dissenter to satisfy the fee awards that were later reversed. Based on that ruling and the record, the dissenter should be granted restitution jointly and severally from the other members for the reversed fee awards totalling \$220,954 (plus interest on that sum), the prior supplemental judgment of \$98,191 for appeal fees and costs, and any additional fee awards for enforcing the mandate. If this remedy is not granted on review, then the remand of this remedy is an additional reason for transferring the case to another trial judge. *See infra* § V F at pages 45-47.

**D. Appellate fees should be awarded pursuant to RCW 25.15.480.**

Humphrey was the prevailing party in the first appeal. 170 Wn.2d at 509, ¶ 26. Humphrey should also be the prevailing party in this second appeal RCW 25.15.480. The amount of appellate fees and costs should be determined on review. There should be a restricted remand to decide the fees incurred below to enforce the mandate.

**E. Appellate fees should be awarded against the other members.**

The general rule is attorney fees are not recoverable in the absence of a contract, statute, a recognized ground in equity, *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 797-98, 557 P.2d 342 (1976), or in the case of “a narrow exception to this rule where specific facts and circumstances warrant.”<sup>73</sup>

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<sup>73</sup> *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

There is a contractual basis and equitable basis for a fee award against the members.

**1. The LLC Agreement's mandatory fee shifting applies.**

The LLC Agreement has a very broad, mandatory fee-shifting provision: "In the event a lawsuit is initiated to enforce the terms of this Agreement, the prevailing party shall be entitled to recover his attorney's fees and costs." LLC Agreement of Clay St. Assocs., LLC, § XXI at 7, 2007 CP 58. This suit was "initiated to enforce the terms of the [LLC] Agreement." *Id.* The complaint's ¶ 15 alleges: "The merger of Clay Street Associates violated the [LLC] Operating Agreement and Dissenters' Rights Statute and Humphrey Industries Rights." Compl. at 5:23-24, 2011 CP 590. The complaint requests: "the Court should ... grant fees and costs to Humphrey Industries pursuant to RCW 25.15.480 or the operating agreement." Compl. at 8:7-10, 2011 CP 593; *id.* at 6:11-2 (stating "[t]he agreement ... permits a prevailing party seeking to enforce the agreement to recover its fees and costs."). Therefore, the mandatory fee provision was triggered at the inception of the case.

RCW 25.15.040(2)(b) explicitly authorizes "the member's ... liabilities may be expanded or restricted by provisions in a limited liability company agreement." Here, the other members consented to the expansion of their liability. Holding them liable for the fee awards in this suit satisfies

the LLC Act's prime directive. "It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." RCW 25.15.800(2). The parties' memorialized expectations were for a long-term investment with the contractual right to "binding arbitration should a controversy or dispute related to the company's business arise." 170 Wn.2d at 498. If anyone acted in "bad faith," the other members did when they bypassed their contractual and statutory duties. 170 Wn.2d at 508, ¶ 24 ("the other members of Clay Street who sought to bypass the dissenters' rights statute and section 8.1 of their own LLC Agreement ...")

The complaint alleges specific violations of the LLC Agreement.<sup>74</sup> The complaint requests that "the Court should appoint an appraiser and grant fees and costs to Humphrey Industries pursuant to RCW 25.15.480 or the operating agreement."<sup>75</sup> Early in the case, the original trial judge granted that

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<sup>74</sup> The Complaint's ¶ 15 identifies the LLC Agreement's unanimous consent requirement for a sale and the requirements for modifications of the agreement. 2011 CP 590-91. Paragraph 16 alleges the merger sought to modify the unanimous consent provision and waive Humphrey's right to veto the sale without complying with the contractual modification and waiver provisions. *Id.* Paragraphs 18, 19, and 20 allege the company is inactive, failed to comply with the dissenter rights statute, kept Humphrey as a guarantor on its primary loan, and distributed the proceeds of the sale of its sole asset to the other members. 2011 CP 592-93.

<sup>75</sup> 2011 CP 593:7-10; *see* Decl. of George Humphrey in Supp. of Pl.'s Mot. for Injunctive Relief ¶¶ 18, 29-30, 32 (alleging forfeiture of rights granted in the LLC Agreement, failure to act on arbitration demands violating Agreement's provisions; keeping Humphrey as guarantor on loan), 2007 CP 41, 44-47.

relief: appointing an appraiser,<sup>76</sup> ruling the company had violated the requirement for the immediate payment of fair value to the dissenter,<sup>77</sup> ordering “the defendants ... to produce documents that are requested under RCW 25.15.135 within 7 business days,”<sup>78</sup> and ordering the company to give notice prior to the disbursement of the remaining proceeds from the sale.<sup>79</sup>

Since the LLC has no assets, the enforcement of the LLC’s Agreement mandatory fee provision will secure the dissenter a partial and much delayed remedy for the vindication of its rights. An award on this basis will avoid the need to evaluate applicability of other exceptions to the American rule.

**2. Alternatively, the members are liable under other exceptions to the American rule.**

RCW 25.15.480(2)(b) authorizes a discretionary fee award against the dissenter or the company “if the court *finds* that the party ... acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.” This standard is similar to the bad faith exception and the breach of fiduciary duty exception to the American rule,<sup>80</sup> or the

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<sup>76</sup> Mot. to Adopt Appraiser’s Report at 3:10 (“appointed Bruce Allen”), 2007 CP 569.

<sup>77</sup> Order Denying Mot. for Summ. J at 2 (ruling “Clay Street Associates, LLC violated RCW 25.15.460(1) in that payment was not timely made.”), 2007 CP 347.

<sup>78</sup> 2007 CP 230 (RCW 25.15.135 requiring a LLC to keep certain records subject to member inspection and copying).

<sup>79</sup> 2007 CP 261.

<sup>80</sup> *Clark v. Horse Racing Comm’n*, 106 Wn.2d 84, 93, 720 P.2d 831 (1986) (summarizing decisions ruling fees could be awarded if the opposing party acted in bad faith); *Simpson v. Thorshund*, 151 Wn. App. 276, 288, 211 P.3d 469 (2009) (affirming award of attorneys (continued . . .))

“narrow exception to this rule where specific facts and circumstances warrant.”<sup>81</sup>

The other members’ violation of the requirement for immediate payment of fair value, their lack of candor in disclosing their plan to violate the statutory requirements, and their merger of the LLC with another LLC having no tax identification number and which either had no capital or \$3 in capital justifies a fee award under the bad faith exception.<sup>82</sup>

On remand, Humphrey requested enforcement of the supplemental judgment against the members.<sup>83</sup> Their conduct violated the partnership agreement or is tantamount to constructive fraud.<sup>84</sup> “Disposing of partnership assets in an attempt to divest another partner of his interest in the property is a breach of fiduciary duty that constitutes constructive fraud” and is a ground for the award of fees against the partner.<sup>85</sup>

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( . . . continued)

fees for egregious and persistent violation of fiduciary duties, as an alternative ground); *accord, Allard v. Pac. Nat’l Bank*, 99 Wn.2d 394, 407-08, 663 P.2d 104 (1983).

<sup>81</sup> *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994) (identifying *Olympic Steamship* as narrow exception to the rule); *McGreevey v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 36, 904 P.2d 731 (1995) (stating the *Olympic Steamship* rule follows from “the special fiduciary relationship . . . between an insurer and insured”).

<sup>82</sup> Finding No. 12 (no tax #), 2011 CP 93; Decl. of Spellman in Supp. of Fees at 6:18-7:6 (citing *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976) and summarizing evidence), 2007 CP 1944-45; Decl. of George Humphrey in Supp. of Pl.’s Mot. for Injunctive Relief ¶¶ 21, 26, 37 (alleging failure to provide information and records and the use of company assets to hire attorney), 2007 CP 42-44, 48.

<sup>83</sup> App. D (Humphrey’s Mot. for Fees at 12:11-16); App. E at AX 244 (Humphrey’s Post-Hearing Submission ¶ 4; *Id.* at AX 254-55, 267 (*McAllister*, 103 Wn. App. at 468); Reply in Supp. of Humphrey’s Mot. for Partial J. at 5:7-19, 2011 CP 135.

<sup>84</sup> *McAllister*, 103 Wn. App. at 468 (quoting *Tang*, 87 Wn.2d at 800), App. E at AX 267.

<sup>85</sup> *McAllister*, 103 Wn. App. at 468.

The record amply supports imposing a fee award under the bad faith exception or the fiduciary duty exception to the American rule.<sup>86</sup> The statutory trustee status and the conduct set forth *supra* in Section V C establish a breach of a fiduciary duty or special duty owed to the dissenter. Like the partnership act construed in *Tang*,<sup>87</sup> the LLC act requires the company records to be available to members, requires specific financial information to be provided to dissenters,<sup>88</sup> and imposes “trustee” status for certain benefits. RCW 25.15.155(2). The other members’ conduct violates those duties and constitutes constructive fraud.<sup>89</sup> This Court made a very similar inference when it implied the other members’ conduct was bad faith. 170 Wn.2d at 508, ¶ 24. For these reasons, fees should be awarded against the other members.

**F. If discretionary rulings are remanded, the case should be transferred to another judge.**

The circumstances warrant transfer of the case to another judge. The trial court has substantial difficulty in putting out of his or her mind “already-expressed views” and the findings determined to be erroneous or based on

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<sup>86</sup> *Allard v. Pac. Nat’l Bank*, 99 Wn.2d at 407-08 (holding “since defendant breached its fiduciary duty plaintiff should be granted their request to recover all attorney fees expended at both trial and on appeal.”)

<sup>87</sup> *Tang*, 87 Wn.2d at 800 n.2. In *Tang*, the negligent breach was the failure to keep the partnership books, render true information, and to hold as a trustee any profits derived from the conduct or liquidation of the partnership without the consent of the other partners. *Id.*

<sup>88</sup> RCW 25.15.460 (requiring financial statements with the fair value calculation).

<sup>89</sup> *Stewart v. Baldwin*, 86 Wash. 63, 72-73, 149 P. 662 (1915) (“A ‘constructive fraud’ has been said to be ‘an act which the law declares to be fraudulent, without inquiring into its motive ... because certain acts carry in themselves an irresistible evidence of fraud.’”).

evidence that must be rejected. *State v. Sledge*, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1998) (granting remand before another judge). This case satisfies the established test for such a transfer.<sup>90</sup>

The trial court here ignored the Opinion's binding rulings and could not put out of mind the reversed awards.<sup>91</sup> Partially reinstating the award in favor of Clay Street, the trial court ruled Humphrey's initial demand "was evidence of his arbitrary motivation in dealing with Clay Street" and drew inferences from Findings 38 to 40.<sup>92</sup> But the earlier decision **did not** conclude the demand was arbitrary, and Humphrey so argued on appeal.<sup>93</sup> Despite the record, the trial court on remand has adopted the arguments made by Clay Street in its appellate pleadings as alternative grounds to affirm the original award.<sup>94</sup> (Humphrey refuted these arguments on appeal<sup>95</sup>

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<sup>90</sup> The federal courts apply a three-part test: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) ... would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1985).

<sup>91</sup> Humphrey's Opp'n to Clay St.'s Mot. for Fees, 2011 CP 405-17.

<sup>92</sup> App. C (Order at 9:20-10:28), CP 692-93; 2007 Findings and Conclusions and Order, 2011 CP 90-118.

<sup>93</sup> App. E at AX 348-49 (Appellant's Revised Opening Br. at 36-37).

<sup>94</sup> Br. of Resp'ts at 38-39; Answer to Pet. for Review at 12, 15-16; Resp'ts' Supplemental Br. at 2, 5, 17; Resp'ts' Mot. for Recons. & Clarification at 6, 14-16, 2011 CP 55, 63-64.

<sup>95</sup> App. E at AX 348-49 (Appellant's Revised Opening Br. at 36-37 (stating dissenter's demand "reasonably relied on the information that was presently available;" appraisals, and a list of 23 comparables)); App. E at AX 352 (Pet'r's Revised Supp. Br. at 19 & nn. 46-49 (stating "company was failing to produce records" and dissenter's demand was consistent with two items of unchallenged data)).

and addressed them again on remand.<sup>96</sup>) Because there was no affirmance on those alternative grounds, the appellate ruling is “binding on the parties to the review and governs all subsequent proceedings ...” RAP 12.2.

The trial court has an even more significant difficulty putting out of mind the reversed fee award in favor of the Rogels. The trial court ruled: “Humphrey was well aware that the Rogels were not involved in his dispute with Clay Street and never should have named them as parties.” App C. (Order at 11:5-9, 2011 CP 718). But the record has compelling reasons why the other members of the dissolved LLC were defendants. Those are the same reasons why Humphrey asked for member liability below and asks again in this second appeal.<sup>97</sup>

Yet, the trial court ignored the record. Its decision even referred to the prior suits: “The Rogels had previously been dismissed twice as defendant in related litigation.” App C (Order at 11:13-14, 2011 CP 718). But this Court’s Opinion ruled this evidence was inadmissible: “The trial court should not have relied on Humphrey’s ... conduct in other suits against Clay Street and the Rogels in awarding fees against Humphrey.” 170 Wn.2d at 508, ¶ 22.

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<sup>96</sup> 2011 CP 415-17 & n.10 (good faith by the stipulation to the court appointed appraiser’s values; dissenter’s \$4.1 million estimate was close to the \$3.95 million cost basis determined by the court appointed appraiser); App. E at AX 244:19-245:13, AX 310-52 (Compilation entitled, “Pleadings Showing Humphrey Adopted Appraisers’ Values and Humphrey’s Testimony on Prelitigation Demand Was to Show Good Faith.”).

<sup>97</sup> *See, e.g.*, RCW 25.15.235(3) (requiring a suit for an impermissible distribution be brought within three years from the date of the distribution).

The trial court's "compari[son of] the violation by Clay Street of its untimely payment of Humphrey's dissenting share with Humphrey's ... valuation and his arbitrary treatment of the Rogels" and its ensuing conclusion thus "it is clear that any fees awarded should on the balance favor Clay Street and the Rogels" demonstrates the trial court's inability to put out of mind its earlier findings determined by this Court to be erroneous. App C (Order at 10:3-7, 2011 CP 717). Instead of the trial court's comparison, the Opinion requires any comparison of "bad faith" to balance against respondents "who sought to bypass the dissenters' rights statute ... their own LLC Agreement" with its restriction on a sale and its arbitration clause. 170 Wn.2d at 498, ¶ 3; *id.* at 508, ¶ 24.

The decision on remand demonstrates the trial court cannot set aside its well-entrenched opinions. The reassignment of the case will not entail waste or duplication out of proportion to the gain in preserving the appearance of fairness. Transfer should be granted.

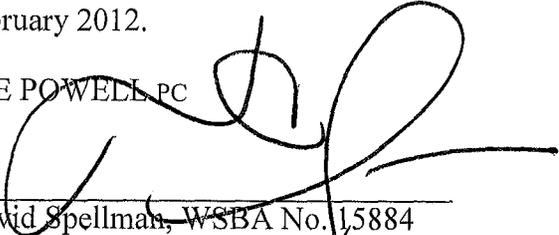
## **VI. Conclusion**

For these reasons, the remarkable reinstatement of the reversed fee awards against Humphrey should be reversed. The other members of Clay Street have been unjustly enriched. To avoid needless litigation on the second remand, this Court should exercise its inherent authority to grant Humphrey restitution and fees as requested in this brief. If there is a

remand for further proceedings, the case should be transferred to another judge to further the ends of justice.

DATED this 22nd day of February 2012.

LANE POWELL PC

By 

David Spellman, WSBA No. 15884  
Stanton Phillip Beck, WSBA No. 16212  
Andrew Gabel, WSBA No. 39310  
Attorneys for Petitioner

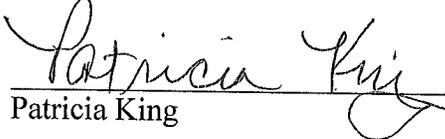
**APPEND CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that on February 22, 2012, I caused to be served a copy of the foregoing **Brief of Petitioner** on the following person in the manner indicated below at the following address:

Mr. Gregory Hollon  
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- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery

  
\_\_\_\_\_  
Patricia King

No. 86643-1

**Humphrey Industries, Ltd. v. Clay S. Associates, LLC**

**Appendix**

**To Brief of Petitioner**

- A: *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 170 Wn.2d 495, 242 P.3d 846 (2010).
- B: Order (Jul. 12, 2011), 2011 CP 705-06.
- C: Order Re: Attorneys' Fees, 2011 CP 708-21.
- D: Extracts from Humphrey's Mot. For Fees, Dkt. 434, and Decl. of David Spellman in Supp. of Humphrey's Mot. For Fees, Dkt, 423, 435, Supplemental Designation.
- E: Extracts from Humphrey Industries Ltd.'s Post-Hearing Submission, Dkt. 414, Supplemental Designation.

## **APPENDIX A**

*Humphrey Indus., Ltd. v. Clay St. Assocs., LLC,*  
170 Wn.2d 495, 242 P.3d 846 (2010).

Westlaw

242 P.3d 846  
 170 Wash.2d 495, 242 P.3d 846  
 (Cite as: 170 Wash.2d 495, 242 P.3d 846)

Page 1

**H**

Supreme Court of Washington,  
 En Banc.  
 HUMPHREY INDUSTRIES, LTD, Petitioner,  
 v.  
 CLAY STREET ASSOCIATES, LLC; 615 Commerce LLC, Clay Associates Phase II LLC, Scott Rogel, Lori Goldfarb; Joseph Rogel and Lee Ann Rogel, husband and wife; ABO Investments, and Avram Investments, Respondents.

No. 82687-1.  
 Argued June 24, 2010.  
 Decided Nov. 10, 2010.

**Background:** Member of limited liability company (LLC) who dissented from LLC's merger filed dissenter's rights lawsuit under the Limited Liability Company Act. LLC subsequently filed a petition seeking judicial determination of LLC's value as of effective merger date. After consolidating the actions, the Superior Court, King County, Harry J. McCarthy, J., found that LLC was worth more as of the merger date than LLC had calculated and accordingly awarded dissenting member the difference plus interest, but awarded LLC attorney fees based on its finding that dissenting member had acted arbitrarily, vexatiously, and not in good faith in pursuing the litigation. Dissenting member appealed. The Court of Appeals, 2008 WL 5182026, affirmed. Dissenting member petitioned for review.

**Holdings:** The Supreme Court, En Banc, J.M. Johnson, J., held that:

- (1) LLC did not substantially comply with provision of the Act requiring LLC to pay dissenting member the fair value of its interest within 30 days of effective merger date;
- (2) remand was warranted for determination of whether an award of attorney fees to dissenting member was appropriate; and
- (3) reversal of attorney fee award in favor of LLC was warranted.

Judgment of Court of Appeals reversed and remanded.

Tom Chambers, J., dissented and filed opinion in which Charles W. Johnson, Susan Owens, and Mary E. Fairhurst, JJ., concurred.

West Headnotes

**[1] Appeal and Error 30 893(1)**

30 Appeal and Error  
 30XVI Review  
 30XVI(F) Trial De Novo  
 30k892 Trial De Novo  
 30k893 Cases Triable in Appellate Court  
 30k893(1) k. In general. Most Cited Cases

Whether a party substantially complied with a statute is a mixed question of law and fact, which appellate court reviews de novo.

**[2] Corporations and Business Organizations 101 3656**

101 Corporations and Business Organizations  
 101XV Unincorporated Business Organizations  
 101XV(E) Limited Liability Companies  
 101k3656 k. Mergers, acquisitions, and reorganizations. Most Cited Cases  
 (Formerly 241Ek49 Limited Liability Companies)

Limited liability company (LLC) did not substantially comply with provision of the Limited Liability Company Act requiring LLC to pay dissenting member the fair value of its interest within 30 days of effective merger date, where LLC did not pay dissenting member until the real estate held by the LLC sold, almost six months after the merger date; purpose of this provision of the Act was to ensure that dissenters had immediate use of the money to which the LLC agreed it had no further

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claim, and it could not be said that LLC actually accomplished or generally satisfied this purpose by means of the delayed payment. West's RCWA 25.15.460.

**[3] Statutes 361** ↪ 174

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k174 k. In general. Most Cited Cases

A party substantially complies with a statutory directive when it satisfies the substance essential to the purpose of the statute.

**[4] Statutes 361** ↪ 174

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k174 k. In general. Most Cited Cases

Substantial compliance with a statutory directive requires actual compliance in respect to the substance essential to the statute's reasonable objectives, such that the purpose of the statutory requirement is generally satisfied.

**[5] Statutes 361** ↪ 174

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k174 k. In general. Most Cited Cases

To substantially comply with a statutory directive, the party attempting to comply with the statute must make a bona fide attempt to comply with the law and must actually accomplish its purpose.

**[6] Corporations and Business Organizations**  
 101 ↪ 1105(4)

101 Corporations and Business Organizations

101III Incorporation and Organization

101III(A) In General

101k1102 Constitutional and Statutory

Provisions

101k1105 General Statutes

101k1105(4) k. Operation and effect in general. Most Cited Cases

(Formerly 101k12.1)

Comments to the Model Business Corporation Act could be used as persuasive authority in interpreting the state Business Corporation Act, even though the legislature did not officially adopt the comments, where the comments were published in the Senate Journal. West's RCWA 23B.01.010 et seq.

**[7] Corporations and Business Organizations**  
 101 ↪ 3656

101 Corporations and Business Organizations

101XV Unincorporated Business Organizations

101XV(E) Limited Liability Companies

101k3656 k. Mergers, acquisitions, and

reorganizations. Most Cited Cases

(Formerly 241Ek49 Limited Liability Companies)

The phrase "substantially comply," in provision of the Limited Liability Company Act authorizing an award of attorney and expert fees against a limited liability company (LLC) if a court finds that the LLC failed to substantially comply with the Act, refers to the "Dissenters' Rights" Article as a whole and contemplates strict compliance with time requirements while allowing for substantial compliance with other aspects of the title. West's RCWA 25.15.425-25.15.480, 25.15.480(2)(a).

**[8] Statutes 361** ↪ 174

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k174 k. In general. Most Cited Cases

What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

**[9] Appeal and Error 30** ↪ 984(5)

30 Appeal and Error

30XVI Review

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30XVI(H) Discretion of Lower Court  
 30k984 Costs and Allowances  
 30k984(5) k. Attorney fees. Most  
 Cited Cases  
 Appellate court reviews attorney fee awards  
 made pursuant to statutes for abuse of discretion.

**[10] Appeal and Error 30 ↪946**

30 Appeal and Error  
 30XVI Review  
 30XVI(H) Discretion of Lower Court  
 30k944 Power to Review  
 30k946 k. Abuse of discretion. Most  
 Cited Cases  
 Appellate court reverses a trial court's decision  
 under the abuse of discretion standard only if it  
 manifestly unreasonable, exercised on untenable  
 grounds, or exercised for untenable reasons, with  
 the last category including errors of law.

**[11] Corporations and Business Organizations  
 101 ↪3656**

101 Corporations and Business Organizations  
 101XV Unincorporated Business Organizations  
 101XV(E) Limited Liability Companies  
 101k3656 k. Mergers, acquisitions, and  
 reorganizations. Most Cited Cases  
 (Formerly 241Ek45 Limited Liability Compan-  
 ies)  
 The award of attorney fees is not mandatory  
 under provision of the Limited Liability Company  
 Act authorizing an award of attorney and expert  
 fees against a limited liability company (LLC) if a  
 court finds that the LLC failed to substantially com-  
 ply with the Act, or against either party if the court  
 finds that party to have acted arbitrarily, vexa-  
 tiously, or not in good faith; the decision to award  
 attorney fees rests in the discretion of the trial  
 court. West's RCWA 25.15.480(2).

**[12] Appeal and Error 30 ↪1177(8)**

30 Appeal and Error  
 30XVII Determination and Disposition of Cause

30XVII(D) Reversal  
 30k1177 Necessity of New Trial  
 30k1177(8) k. Insufficiency of verdict  
 or findings. Most Cited Cases

Supreme Court's determination that limited li-  
 ability company (LLC) did not substantially comply  
 with provision of the Limited Liability Company  
 Act requiring LLC to pay dissenting member the  
 fair value of its interest within 30 days of effective  
 merger date warranted remand for determination of  
 whether an award of attorney fees to dissenting  
 member was appropriate, where Court of Appeals  
 affirmed trial court's denial of attorney fees to dis-  
 senting member based on erroneous legal conclu-  
 sion that LLC substantially complied with this pro-  
 vision of the Act. West's RCWA 25.15.460,  
 25.15.480(2)(a).

**[13] Appeal and Error 30 ↪1171(3)**

30 Appeal and Error  
 30XVII Determination and Disposition of Cause  
 30XVII(D) Reversal  
 30k1171 Amount or Extent of Recovery  
 30k1171(3) k. Allowance or disallow-  
 ance of costs and fees. Most Cited Cases  
 Trial court's improper reliance on dissenting  
 member's rejection of a pretrial settlement offer and  
 an offer of judgment, in awarding attorney fees to  
 limited liability company (LLC) based on finding  
 that dissenting member acted arbitrarily, vexa-  
 tiously, or not in good faith, warranted reversal of  
 attorney fee award in favor of LLC, in dissenter's  
 rights lawsuit under the Limited Liability Company  
 Act. West's RCWA 25.15.480(2)(b).

**[14] Evidence 157 ↪213(1)**

157 Evidence  
 157VII Admissions  
 157VII(A) Nature, Form, and Incidents in  
 General  
 157k212 Offers of Compromise or Settle-  
 ment  
 157k213 In General  
 157k213(1) k. In general. Most

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Evidence of conduct in settlement negotiations was inadmissible to prove liability for or invalidity of the claim or its amount, in dissenter's rights lawsuit under the Limited Liability Company Act. West's RCWA 25.15.425 - 25.15.480; Rules of Evid., Rule 408.

**\*\*848** David Christopher Spellman, Stanton Phillip Beck, Lane Powell PC, Seattle, WA, for Petitioner.

Gregory J. Hollon, Barbara Himes Schuknecht, McNaul Ebel Nawrot & Helgren, Alan B. Bornstein, Attorney at Law, Seattle, WA, for Respondents.

J.M. JOHNSON, J.

**\*497** ¶ 1 Humphrey Industries, Ltd., by means of its principal, George Humphrey (Humphrey), and with business partners Joseph and Ann Lee Rogel, Scott Rogel, and ABO Investments, by means of its principal, Gerald Ostroff, created Clay Street Associates, LLC (Clay Street), to hold a single real estate asset located in Auburn, Washington. In order to break a deadlock with Humphrey regarding the sale of the property in late 2004, the other members of Clay Street agreed to merge the company into a new limited liability company with a different voting structure that could facilitate the sale. Humphrey dissented from the merger and demanded payment pursuant to the dissenters' rights provisions of the Washington Limited Liability Company Act (LLC Act or the Act), chapter 25.15 RCW. As required by the Act, Clay Street paid Humphrey what Clay Street calculated as the fair market value of Humphrey's interest in Clay Street as of the effective merger date in December 2004; however, Clay Street did not pay until the property sold in May 2005.

¶ 2 Humphrey rejected Clay Street's value calculation and filed suit. Clay Street subsequently filed a petition for **\*498** judicial determination of the property's value as of the effective merger date. The trial court consolidated the actions and heard testimony over several **\*\*849** days in June 2007. It

found that the property was worth more as of the merger date than Clay Street had calculated and accordingly awarded Humphrey the difference plus interest. However, the court also awarded Clay Street and the Rogels attorney fees based on its finding that Humphrey had acted arbitrarily, vexatiously, and not in good faith in pursuing the litigation. Humphrey appealed, and the Court of Appeals affirmed in an unpublished opinion. *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, noted at 147 Wash.App. 1045, 2008 WL 5182026 (2008). Humphrey then petitioned this court for review. *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 166 Wash.2d 1014, 210 P.3d 1019 (2009). We reverse the Court of Appeals and remand for reconsideration of the attorney fee award.

## FACTS AND PROCEDURAL HISTORY

¶ 3 Humphrey, Scott Rogel, Joseph and Ann Lee Rogel, and ABO Investments formed Clay Street in May 1997 to purchase and manage a single parcel of real property located in Auburn, Washington. Clay Street's LLC Agreement specified that the property "shall not be sold, conveyed, and/or assigned without the mutual consent of each of the members...." Clerk's Papers (CP) at 54. The LLC Agreement also provided for binding arbitration should a controversy or dispute related to the company's business arise.

¶ 4 Such a dispute occurred in 2004 when Scott Rogel, in order to implement a property settlement reached during his divorce, sought to sell the property and dissolve Clay Street. Humphrey refused to consent to the sale, and the other members of Clay Street sought the advice of an attorney as to how they might circumvent the unanimity requirement of the LLC Agreement and sell the property notwithstanding Humphrey's veto. The attorney advised **\*499** them that, since further negotiations were futile, the sale could "be accomplished most quickly through a merger procedure which eliminates the dissenting vote." CP at 62.

¶ 5 Pursuant to this suggestion, the remaining members of Clay Street formed a new limited liab-

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ility company in August 2004 and merged it with Clay Street. The members gave Humphrey notice of its statutory right to dissent to the merger, and Humphrey exercised this right on October 1, 2004, demanding payment of the fair value of its interest in the company. The merger became effective on December 7, 2004.

¶ 6 Because it had not yet sold the property and had no other assets, Clay Street lacked funds with which to pay Humphrey the fair value of its interest within 30 days of the effective merger date, as required by statute. Later, on May 27, 2005, Clay Street paid Humphrey \$181,192.64—which it calculated to be the fair value of Humphrey's interest as of the merger date, plus interest for the delay—following the sale of the property earlier that month for \$3.3 million. Humphrey immediately disputed the value calculated by Clay Street and demanded an additional \$424,607 based on its own estimate of fair value. Clay Street refused to pay the additional sum and Humphrey filed suit on June 21, 2005. One month later, Clay Street offered to settle Humphrey's claims for \$325,376. Humphrey rejected the offer. Clay Street subsequently filed a formal petition to determine the fair value of the company; the two cases were consolidated to resolve that issue and those raised by Humphrey in its derivative suit. In another effort to resolve the litigation, Clay Street made a CR 68 offer of judgment for an additional \$165,275.59 in September 2006,<sup>FN1</sup> but Humphrey refused that offer as well.

FN1. This, combined with the \$181,192.64 that Humphrey had already received, would have resulted in Clay Street paying Humphrey a total of \$346,468.23.

\*500 ¶ 7 After several delays,<sup>FN2</sup> a six-day bench trial was held in June 2007.<sup>FN3</sup> The court heard evidence from several different appraisers and experts, along with testimony from Clay Street members Scott Rogel, \*\*850 George Humphrey, and Gerald Ostroff.<sup>FN4</sup> The court found that the pattern and magnitude of offers made for the property “did not indicate a distressed, forced or fire

sale” and that the final sale price reflected the fair value of Clay Street as of May 2005.<sup>FN5</sup> CP at 1667. The court deemed this price to be highly relevant to the fair value of the company five months earlier and accordingly adopted as the most accurate measure of Clay Street's value as of December 7, 2004, the \$3.15 million valuation of the only appraiser who had considered it. The court ordered Clay Street to pay Humphrey an additional \$60,588.22 based on this valuation.<sup>FN6</sup>

FN2. These included the untimely death of the initial court-appointed appraiser, Bruce Allen, and the replacement of the original trial judge, Judge Michael Hayden, with Judge Harry J. McCarthy, following the former judge's reassignment to the criminal calendar.

FN3. Several attempts at arbitration had failed by this point.

FN4. The valuations of Clay Street examined at trial ranged from \$2.5 to \$4.1 million, depending on the party conducting the valuation, the method used, and date of the estimate. Only Humphrey's valuation exceeded \$4 million; all others were well below that figure.

FN5. In making these determinations, the court specifically found the testimony of Gerald Ostroff to be credible. It also found that the opinions of George Humphrey were “not entitled to the same weight” as those of the professional appraisers who evaluated the property because (i) he was not an expert witness and (ii) “the evidence used in his valuation appears to be well outside of the mainstream of reasonably based valuations in this case.” CP at 1674–75.

FN6. Using the \$3.15 million valuation, the court determined that the fair value of Humphrey's 25 percent interest in the com-

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pany was \$231,947.17 on the effective merger date; to this it added \$9,833.69 of interest and subtracted the \$181,192.64 already paid to calculate the new amount owed.

¶ 8 The trial court also found that Clay Street violated the LLC Act by failing to pay Humphrey the fair value of its interest within 30 days of the effective merger date as required by RCW 25.15.460. Nevertheless, it concluded that Clay Street had substantially complied with the Act "given that [it] lacked any funds to make the payment to Humphrey, that it could not obtain the requisite funds \*501 without a sale of the property, and that it was willing to pay the statutorily required interest during the period of delay." CP at 2315. The court also declined to award Humphrey attorney fees as provided under RCW 25.15.480(2)(a) FN7 and instead awarded fees and expenses to Clay Street and Joseph and Ann Lee Rogel under subsection (b) of the same provision based on its finding that Humphrey acted arbitrarily, vexatiously, and not in good faith in pursuing its dissenter's rights claim.

FN7. RCW 25.15.480(2) reads, in full:

The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(a) Against the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of this article; or

(b) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.

¶ 9 The Court of Appeals affirmed the trial court's determination of fair value and interest and its attorney fee award. *Humphrey Indus., Ltd.*, noted at 147 Wash.App. 1045, 2008 WL 5182026. Humphrey subsequently petitioned this court for review of the latter issue, which we granted. *Humphrey Indus., Ltd.*, 166 Wash.2d 1014, 210 P.3d 1019. In its petition, Humphrey objects first to the Court of Appeals' determination that Clay Street substantially complied with the statutory deadline for payment of fair value set by RCW 25.15.460 and, second, to the court's finding that Humphrey acted arbitrarily, vexatiously, and not in good faith. Together, these findings formed the basis for the court's award of fees and expenses to Clay Street and the Rogels and its refusal to award the same to Humphrey. We limit our review to these two concerns pursuant to RAP 13.7(b) and do not address the issue of fair value, which Humphrey did not raise in its petition.

#### ANALYSIS

[1] ¶ 10 Whether a party substantially complied with a statute is a mixed question of law and fact, which we review \*502 de novo. *State v. Dearbone*, 125 Wash.2d 173, 178, 883 P.2d 303 (1994). We review attorney fee awards for abuse of discretion. *Noble v. Safe Harbor Family Pres. Trust*, 167 Wash.2d 11, 17, 216 P.3d 1007 (2009).

\*\*851 I. *Substantial Compliance with RCW 25.15.460*

[2] ¶ 11 Upon timely receipt of a demand for payment from a member who dissents from a proposed merger, a limited liability company must pay the member the fair value of the member's interest in the company. The time and manner in which this payment is to be tendered is governed by RCW 25.15.460, which reads:

(1) Within thirty days of the later of the date the proposed merger becomes effective, or the payment demand is received, the limited liability company shall pay each dissenter who complied with RCW 25.15.450 the amount the limited liability company estimates to be the fair value of the

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dissenting member's interest in the limited liability company, plus accrued interest.

(2) The payment must be accompanied by:

(a) Copies of the financial statements for the limited liability company for its most recent fiscal year;

(b) An explanation of how the limited liability company estimated the fair value of the member's interest in the limited liability company;

(c) An explanation of how the accrued interest was calculated;

(d) A statement of the dissenter's right to demand payment; and

(e) A copy of this article.

The dissenter can notify the company in writing of the dissenter's own estimate of the fair value of the dissenter's interest and demand payment of that estimate if (i) the company fails to make payment within 60 days after the date set for demanding payment or (ii) the dissenter believes that the amount paid is less than the fair value of the dissenter's interest. *See* RCW 25.15.470.

\*503 ¶ 12 As mentioned above, both the trial court and the Court of Appeals found that Clay Street "substantially complied" with the directives contained in RCW 25.15.460, despite its failure to tender payment within 30 days of the effective merger date as required by statute—that date being the later of the two dates listed in RCW 25.15.460(1).

¶ 13 Humphrey contends that the lower courts erred by finding that Clay Street substantially complied with the statute. It argues that substantial compliance with a statutory deadline, including a specified time such as that contained in RCW 25.15.460, is impossible—one either complies with it or not. *See* Pet. for Review at 9 (citing *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wash.2d 923, 928–29, 809 P.2d 1377 (1991); *West-*

*cott Homes, LLC v. Chamness*, 146 Wash.App. 728, 735, 192 P.3d 394 (2008); *Petta v. Dep't of Labor & Indus.*, 68 Wash.App. 406, 409–10, 842 P.2d 1006 (1992)). Since Clay Street concedes that it did not tender payment of the fair value of Humphrey's interest within the 30 day statutory window, Humphrey claims that Clay Street could not have substantially complied with RCW 25.15.460 and that the trial court's finding, as affirmed by the Court of Appeals, is therefore in error.

¶ 14 Clay Street counters by arguing that "substantial compliance" deserves a broader interpretation where timeliness is not a jurisdictional requirement. *See* Answer to Pet. for Review at 9–10 (citing *In re Habeas Corpus of Santore*, 28 Wash.App. 319, 327, 623 P.2d 702 (1981); BLACK'S LAW DICTIONARY 1470 (8th ed.2004)). Under such a reading, "substantial compliance" does not connote flawless compliance but rather "actual compliance in respect to the substance essential to every reasonable objective of the statute." *Id.* at 10 (quoting *Santore*, 28 Wash.App. at 327, 623 P.2d 702). Clay Street argues that the factual circumstances of each case are relevant when applying this standard and that the lower courts' finding that it substantially complied with the statute was proper, based as it was on the facts—namely, Clay Street's financial inability to tender payment by the \*504 deadline and its speedy delivery of the funds as soon as they were available.<sup>FN8</sup> *Id.* at 10–11.

FN8. The dissent suggests that the practical realities of marketing real estate and the fact that Clay Street had only one asset should play a role in our analysis. *See* dissent at 855. Clay Street should have taken these factors into consideration in deciding whether its merger procedure could actually effect the purpose intended by its controlling members. If it could not (and it did not), an appropriate course of action on Scott Rogel's part may have been to ask the court approving the property settlement

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agreement for an extension of time or to find a substitute for the deadlocked real estate asset.

**\*\*852** [3][4][5] ¶ 15 Humphrey's argument is more persuasive. A party substantially complies with a statutory directive when it satisfies the substance essential to the purpose of the statute. See *Crosby v. County of Spokane*, 137 Wash.2d 296, 302, 971 P.2d 32 (1999) (citing *Cont'l Sports Corp. v. Dep't of Labor & Indus.*, 128 Wash.2d 594, 602, 910 P.2d 1284 (1996)). As Clay Street correctly observes, this requires "actual compliance in respect to the substance essential to the statute's reasonable objectives," such that "the purpose of the [statutory] requirement is generally satisfied." *In re Det. of A.S.*, 138 Wash.2d 898, 927, 982 P.2d 1156 (1999) (citing *Crosby*, 137 Wash.2d at 302, 303, 971 P.2d 32). The party attempting to comply with the statute must "make a 'bona fide attempt to comply with the law' and ... 'must actually accomplish its purpose.'" *Remmer v. City of Marysville*, 168 Wash.2d 540, 545, 230 P.3d 569 (2010) (quoting *Brigham v. City of Seattle*, 34 Wash.2d 786, 789, 210 P.2d 144 (1949)).

[6][7] ¶ 16 The purpose of RCW 25.15.460 is to ensure that dissenters "have immediate use of the money to which the corporation agrees it has no further claim." 2 SENATE JOURNAL, 51st Leg., Reg. Sess. at 3091 (Wash.1989) (quoting app. A cmts. to Washington Business Corporation Act § 13.25).<sup>FN9</sup> \*505 Humphrey's rights as a member of Clay Street terminated on December 7, 2004, the effective merger date. In order to effectuate the purpose of RCW 25.15.460, Humphrey should have had immediate use of the fair value of its interest in the company—i.e., it should have received the money within 30 days of the merger date. Humphrey did not receive payment within that time frame; instead, Clay Street sent the funds almost six months later. It cannot be said that Clay Street "actually accomplish[ed]," *Brigham*, 34 Wash.2d at 789, 210 P.2d 144, or "generally satisfied," *A.S.*, 138 Wash.2d at 927, 982 P.2d 1156, the purpose of

RCW 25.15.460 by means of this delayed payment. *Accord Pub. Employment Relations Comm'n*, 116 Wash.2d at 928–29, 809 P.2d 1377 ("It is impossible to substantially comply with a statutory time limit... It is either complied with or it is not."). Clay Street therefore did not substantially comply with the statutory deadline, and we reverse the Court of Appeals insofar as it held otherwise.<sup>FN10</sup>

FN9. The national Model Business Corporation Act (Model Act), upon which the Washington Business Corporation Act (WBCA), Title 23B RCW, is largely based, was last revised in 1984. Five years later, the Washington legislature substantially revised the WBCA to incorporate many of the 1984 Model Act revisions. See Laws of 1989, ch. 165; *Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.*, 158 Wash.2d 603, 620–21, 146 P.3d 914 (2006) (J.M. Johnson, J., concurring); *Equipto Div. Aurora Equip. Co. v. Yarmouth*, 134 Wash.2d 356, 361, 950 P.2d 451 (1998). Although the legislature did not officially adopt the comments to the 1984 Model Act, they are published in the *Senate Journal* and may be used as persuasive authority. See *Ballard*, 158 Wash.2d at 623, 146 P.3d 914 (J.M. Johnson, J., concurring). The full text of the comment relevant to RCW 25.15.460 reads: "This obligation to make immediate payment is based on the view that since the person's rights as a shareholder are terminated with the completion of the transaction, the shareholder should have immediate use of the money to which the corporation agrees it has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed." 2 SENATE JOURNAL, *supra*, at 3091.

FN10. The dissent's interpretation of our

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holding misapprehends the impact of RCW 25.15.480(2), which controls our analysis here. Dissent at 854-55. RCW 25.15.480(2)(a) states:

The court may also assess the fees and expenses of counsel and experts ... [a]gainst the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of *this article*.

(emphasis added.) “*This article*” refers to Article XII of chapter 25.15 RCW, which is entitled “Dissenters’ Rights.” Article XII consists of RCW 25.15.425 through RCW 25.15.480. Within Article XII, there are both “time-sensitive” components that must be complied with, such as RCW 25.15.460(1) and “time-sensitive” components that do not depend on time. The phrase “substantially comply” refers to Article XII as a whole and contemplates strict compliance with time requirements while allowing for substantial compliance with other aspects of the title. If the legislature had intended otherwise here, it might have said “thirty days or a reasonable time” instead of “thirty days.” See RCW 25.15.460(1).

\*\*853 [8] ¶ 17 Further, as Clay Street itself concedes in its briefing, “[w]hat constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.” Answer to Pet. for Review at 10 (quoting \*506 Santore, 28 Wash.App. at 327, 623 P.2d 702). The relevant facts of this particular case, as summarized above, indicate that Clay Street did not substantially comply with RCW 25.15.460 and its purpose; Humphrey did not have anything close to “immediate” use of the \$181,192.64 even though Clay Street agrees it had no further claim to that sum after the merger. As a result, we reverse the

Court of Appeals’ finding that Clay Street substantially complied with RCW 25.15.460 notwithstanding its delayed payment of fair value to Humphrey. FN11 A six-month deferral of payment is not “substantial compliance” with a statute that unambiguously requires payment “within thirty days.”

FN11. The dissent acknowledges that the legislature “clearly wanted to protect dissenters’ rights and assure prompt payment,” dissent at 855, but argues that “the legislature was also mindful that 30 days is a very short time frame in which to accomplish a merger [and][t]here is nothing in the statute to suggest that the legislature intended to ... [force] a fire sale at a very unfavorable price.” *Id.* at 855. It is likely that the legislature chose 30 days assuming that merging business entities would have the prudence and good faith to lay the groundwork for selling property well before a merger became effective, or seek other financing, so as to meet the statutory requirement.

## II. Attorney Fees

[9][10] ¶ 18 We review attorney fee awards made pursuant to statutes, such as RCW 25.15.480, for abuse of discretion. *Noble*, 167 Wash.2d at 17, 216 P.3d 1007; *Morgan v. Kingen*, 166 Wash.2d 526, 539, 210 P.3d 995 (2009); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wash.2d 364, 375, 798 P.2d 799 (1990). We reverse a trial court’s decision under this standard only if it “is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons,” with the last category including errors of law. *Noble*, 167 Wash.2d at 17, 216 P.3d 1007.

[11] ¶ 19 As previously noted, *see supra* note 7, the LLC Act authorizes an award of attorney and expert fees (a) against the limited liability company if the court finds that it failed to substantially comply with the Act or (b) against either party if the court finds that party to have acted arbitrarily, vexatiously, or not in good faith. *See* RCW

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25.15.480(2). Humphrey claims that it is entitled to attorney fees under the former subsection; Clay Street counters \*507 that it is entitled to the same under the latter, as both the trial court and the Court of Appeals ruled. Importantly, though, the award of attorney fees under RCW 25.15.480(2) is not mandatory. *Id.* (“The court *may* also assess the fees and expenses of counsel ....” (emphasis added)). Thus, even if Clay Street *did* fail to substantially comply with the 30 day statutory deadline, or if Humphrey *did* act arbitrarily, vexatiously, or not in good faith, the opposing party is not automatically *entitled* to an award of attorney fees. Rather, the decision to award attorney fees rests in the discretion of the trial court.

¶ 20 Here, the trial court found that Clay Street substantially complied with the LLC Act notwithstanding the extreme delay of its payment to Humphrey—a delay that unquestionably violated the 30 day statutory deadline. It refused to grant Humphrey attorney fees on this basis. The court also found that Humphrey acted arbitrarily, vexatiously, and not in good faith in pursuing the litigation and, as a result, awarded attorney and expert fees to Clay Street and the Rogels. The Court of Appeals affirmed on both issues. We reverse the Court of Appeals and remand for reconsideration of the denial of such fees to Humphrey.

[12] ¶ 21 We hold today that the conclusion that Clay Street substantially complied with the Act is erroneous. Clay Street did not do so, and both the trial court and the Court of Appeals committed an error of law by so concluding. Under *Noble*, we reverse attorney fee decisions that are based on “untenable reasons,” a category that “include[s] errors of law.” *Noble*, 167 Wash.2d at 17, 216 P.3d 1007. Accordingly, we reverse the Court of Appeals’ decision affirming the trial court’s denial of attorney fees to Humphrey, based as it was on the erroneous legal conclusion\*\*854 that Clay Street substantially complied with RCW 25.15.460. We remand for further proceedings to determine whether, given Clay Street’s failure to substantially com-

ply with the LLC Act, an award of fees to Humphrey is appropriate.

[13][14] ¶ 22 Reversal of the attorney fee award in favor of Clay Street and the Rogels is also warranted. That award was \*508 based on the trial court’s finding that Humphrey acted arbitrarily, vexatiously, and not in good faith, a finding that rested in part on Humphrey’s rejection of a pretrial settlement offer and a CR 68 offer of judgment. Evidence of conduct in settlement negotiations, however, is inadmissible to prove liability for or invalidity of the claim or its amount. The trial court should not have relied on Humphrey’s prelitigation conduct or conduct in other suits against Clay Street and the Rogels in awarding fees against Humphrey.

¶ 23 While the dissent notes that such evidence may be admitted if offered for other purposes (ER 408), evidence of Humphrey’s rejection of a pretrial offer was not properly admitted. Dissent at 856. The record supports the conclusion: the trial court specifically referred to the offers as a “substantial windfall.” CP at 2324. This is a direct comment on the validity of the claim or its amount.

¶ 24 Even if the evidence was admitted for a permissible purpose, given the circumstances of this case, the record does not establish that Humphrey’s actions were arbitrary, vexatious, and not in good faith. If any acts were in bad faith, they were committed by the other members of Clay Street, who sought to bypass the dissenters’ rights statute and section 8.1 of their own LLC Agreement, which specifies that the property, “shall not be sold, conveyed, and/or assigned without the mutual consent of each of the members....” CP at 54.

¶ 25 We reverse the trial court’s award of attorney fees against Humphrey and in favor of the other parties, based as it was on “untenable grounds.” *Noble*, 167 Wash.2d at 17, 216 P.3d 1007. We remand for consideration of whether, in light of Clay Street’s failure to substantially comply with the statute, Humphrey is entitled to attorney fees.

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## CONCLUSION

¶ 26 Clay Street plainly failed to pay Humphrey the fair value of its interest in the company within 30 days of the \*509 effective merger date as required by RCW 25.15.460. Instead, it partially paid that value six months later. Humphrey was thereby deprived of the immediate use of the fair value of its interest, contrary to the underlying purpose of the dissenters' rights statute. It follows that Clay Street did not substantially comply with the statute. We reverse the Court of Appeals' conclusion to the contrary and, in light of that reversal, remand for a determination of whether Humphrey is entitled to attorney fees under RCW 25.15.480. As the prevailing party, Humphrey is entitled to attorney fees for this appeal.

WE CONCUR: BARBARA A. MADSEN, Chief Justice, GERRY L. ALEXANDER, RICHARD B. SANDERS, and DEBRA L. STEPHENS, Justices.

CHAMBERS, J. (dissenting).

¶ 27 I find the majority's resolution puzzling. The statute controlling dissenters' rights contemplates that those rights may be satisfied by substantial compliance. In fact, the statute specifically authorizes a substantial compliance inquiry. RCW 25.15.480.<sup>FN1</sup> \*\*855 Notwithstanding this clear directive from the legislature, the majority concludes that the statutory requirement that payment to the dissenter be tendered within 30 days can be satisfied only by strict compliance. Majority at 851. That is the puzzling part. The majority ignores the trial \*510 court's careful findings of substantial compliance and flouts the legislature's clear directive that only substantial compliance is required. The majority is wrong. I respectfully dissent.

<sup>FN1</sup>. (1) ... The court shall assess the *costs* against the limited liability company, except that the court may assess the costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment.

(2) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(a) Against the limited liability company and in favor of any or all dissenters *if the court finds the limited liability company did not substantially comply with the requirements of this article*; or

(b) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.

RCW 25.15.480 (emphasis added).

¶ 28 Although the parties had other business relations, relevant here is that Humphrey Industries, Ltd., by means of its principal, George Humphrey (Humphrey), joined Joseph and Ann Lee Rogel, Scott Rogel, and ABO Investments, by means of its principal, Gerald Ostroff, to create Clay Street Associates, LLC, for the purpose of acquiring and managing real estate. Importantly, the company purchased and owned only one piece of real estate. One of the Rogels decided to divorce and sought to liquidate his interest. Humphrey refused. Following a statutorily permissible merger procedure, the Rogels and Ostroff formed WXYZ, LLC. Humphrey was given notice of his dissenter's rights, formally dissented, and on October 1, 2004, demanded payment for his interest. Under the statutory scheme, Humphrey was entitled to payment within 30 days of his demand. The problem was that the single asset of the company, a commercial warehouse, could not be marketed so quickly. The parties disagreed on values; the relationship between Humphrey and the other investors became acrimonious, and numerous legal actions followed.

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¶ 29 Ultimately, a trial judge determined the value of the property as of the date of merger to be \$3.15 million, with Humphrey's share to be \$231,947 plus interest of \$60,588, and offset by the \$181,192 he had already been paid. The trial court also found that the remaining investors had substantially complied with the statutory requirements of the merger procedure and that Humphrey had acted arbitrarily, vexatiously, and not in good faith, and thus assessed attorney fees against Humphrey.

¶ 30 First, under the plain words of the statute, courts are required to conduct a substantial compliance inquiry in awarding attorney fees for dissenters' rights disputes. RCW 25.15.480. The inquiry "depend[s] on the facts of each particular case," and the facts of this case support the \*511 conclusion that Clay Street "generally satisfied" the purpose of the requirement. *In re Habeas Corpus of Santore*, 28 Wash.App. 319, 327, 623 P.2d 702 (1981); *Crosby v. County of Spokane*, 137 Wash.2d 296, 303, 971 P.2d 32 (1999) (finding substantial compliance with a statutory requirement where "generally the purpose of the requirement will be satisfied"). While the legislature clearly wanted to protect dissenters' rights and assure prompt payment, the legislature was also mindful that 30 days is a very short time frame in which to accomplish a merger and the often resulting requirements of accounting, apportionment, appraisal, sale, settlement and other potential steps in the transfer of property, assets, debts, and liabilities associated with the process. There is nothing in the statute to suggest that the legislature intended to punish the remaining investors in a single asset by forcing a fire sale at a very unfavorable price.<sup>FN2</sup> Instead, the legislature provided for the escape valve of "substantial compliance." As described by the Court of Appeals, Washington courts have defined "substantial compliance" as " 'actual compliance in respect to the substance essential to every reasonable objective of [a] statute.' " *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, noted at 147 Wash.App. 1045, 2008 WL 5182026, at \*4 (alteration in the original) (quoting *City of Seattle v. Pub. Employment Rela-*

*tions Comm'n*, 116 Wash.2d 923, 928, 809 P.2d 1377 (1991) (quoting *Santore*, 28 Wash.App. at 327, 623 P.2d 702)).

FN2. Given the realities of securing financing and the attendant appraisals, review of ecological, zoning, floodplain, insurance, and other related matters, 30 days is not a practical time limit for any transaction requiring the sale of commercial real estate.

¶ 31 Second, the statute contemplates a dispute resolution process that would take the parties far beyond the 30-day payment window. RCW 25.15.475(1).

\*\*856 ¶ 32 Third, we have held that under this statute, the attorney fees are permissive, not mandatory. *Natl Elec. Contractors Ass'n v. Riveland*, 138 Wash.2d 9, 28, 978 P.2d 481 (1999) ("the term 'may' in a statute has a permissive or \*512 discretionary meaning" (citing *Yakima County (W.Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 381, 858 P.2d 245 (1993))). Given the facts of this case and the discretion vested in the trial judge's hands by this statute, the trial court did not err in refusing to award attorney fees to Humphrey. According to the trial court's findings, the merger resulted from Humphrey's unwillingness to liquidate a dysfunctional enterprise, and Clay Street paid out as soon as it obtained the money, with interest. Furthermore, Clay Street attempted to avoid litigation by making an offer well in excess of the eventual judgment, which Humphrey refused.

¶ 33 The courts below had sufficient ground to find that Clay Street substantially complied with the statute, and I would thus affirm their denial of Humphrey's request for attorney fees.

¶ 34 Finally, the majority concludes that, in finding that Humphrey acted arbitrarily, vexatiously, or not in good faith, the courts below improperly considered Humphrey's rejection of a prelitigation offer well in excess of the eventual judgment. Majority at 854 (citing ER 408). By its very

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terms, however, the rule cited does not exclude evidence of conduct in settlement negotiations if offered for a purpose other than proving or denying liability. <sup>FN3</sup> Here, the evidence was properly admitted as relevant to state of mind. *Bulaich v. AT & T Info. Sys.*, 113 Wash.2d 254, 263–64, 778 P.2d 1031 (1989) (allowing admission of prelitigation negotiations for the purpose of establishing intent). In fact, \*513 this court has specifically approved the use of such evidence to show good faith. *Matteson v. Ziebarth*, 40 Wash.2d 286, 294, 242 P.2d 1025 (1952). Excluding evidence so clearly relevant to lack of good faith would defeat the express purpose of giving the courts discretion to award attorney fees under the dissenters' rights statute, namely, to encourage good faith efforts to settle disputes out of court. See 2 SENATE JOURNAL, 51st Leg., Reg. Sess., at 3092–93 (Wash.1989) (quoting app. A cmts. to Washington Business Corporation Act §§ 13.28, .31).

FN3. In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. *This rule also does not require exclusion when the evidence is offered for another purpose*, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

ER 408 (emphasis added).

¶ 35 In sum, I would affirm the Court of Ap-

peals in all respects.

WE CONCUR: CHARLES W. JOHNSON, SUSAN OWENS, and MARY E. FAIRHURST, Justices.

Wash.,2010.  
*Humphrey Industries, Ltd. v. Clay Street Associates, LLC*  
 170 Wash.2d 495, 242 P.3d 846

END OF DOCUMENT

**APPENDIX B**

Order (Jul. 12, 2011), 2011 CP 705-06.

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

Humphrey Industries, LTD,  
  
PLAINTIFF,  
v.  
Clay Street Associates, LLC,  
DEFENDANT.

No. 05-2-20201-7 SEA  
(Consolidated with  
05-2-24967-6 SEA)

Clay Street Associates, LLC, a limited  
liability company,  
PLAINTIFF,  
v.  
Humphrey Industries, LTD, a  
Washington corporation.  
DEFENDANT.

ORDER

THIS COURT has reviewed the various submissions by the parties in light of the Supreme Court's opinion reported at 170 Wn. 2d 495 (2010). That opinion remanded this matter for a reconsideration of possible awards of attorney's fees under the facts of this case and RCW 25.15.480. In evaluating to what extent, if at all, attorney fees should be awarded on remand, the court will exercise its discretion "in amounts the court finds equitable" RCW 25.15.480 (2).

Humphrey Industries Inc. (Humphrey) has asserted that the \$246,213.50 in fees and costs awarded to Clay Street and to the Rogels should simply be reversed in favor of Humphrey.

ORDER

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

1 However, such an award would be contrary to a required lodestar analysis of Humphrey's  
2 billing statements and is not an appropriate means of determining attorney's fees. Bowers v.  
3 Transamerica Title Co., 100 Wn. 2d 581, 597, 675, P.2d 193 (1983).

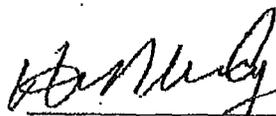
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5 The Supreme Court has determined that Clay Street did not substantially comply with  
6 RCW 25.15.460. This court has reviewed the billing statements by Humphrey's counsel in  
7 Exhibit (c) of Humphrey's Motion for Fees. However, it is difficult, if not impossible, to  
8 segregate fees that are reasonably related to the "substantial compliance" prong of section 2(a)  
9 from the "arbitrary, vexatious" prong of section 2(b).

10  
11 In order to make a reasonable evaluation of a possible award of fees and costs to  
12 Humphrey with respect to Clay Street's failure to substantially comply with RCW 25,

13 **IT IS ORDERED** that counsel for Humphrey submit a declaration segregating fees and  
14 costs between Sections 2(a) and 2(b). Such declaration, with appropriate supporting billings  
15 and documentation, is to be filed with the court by July 25, 2011 with any response by Clay  
16 Street by August 1, and reply by Humphrey by August 3, 2011.

17  
18 Upon receipt of this additional information, the court will determine an appropriate  
19 award of attorney's fees and costs between the parties pursuant to RCW 25.15.480 (2)(a)  
20 and(b).

21  
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23 Dated this 12 day of July 2011.

24  
25   
26 Harry J. McCarthy

27  
28  
29 ORDER

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-298-9205

# **APPENDIX C**

Order Re: Attorneys' Fees, 2011 CP 708-21.



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- (3) Clay Street Associates, LLC's and Joseph and Ann Lee Rogel's Motion for Attorneys' Fees and Costs with attached exhibits;
- (4) Humphrey Industries LTD's Opposition to Clay Street Associates LLC and Joseph and Ann Lee Rogel's Motion for Attorneys' Fees and Costs;
- (5) Clay Street Associates LLC's Objection to Humphrey Industries LTD's Proposed Supplemental Judgment for fees on appeal with attached exhibits;
- (6) Humphrey Industries LTD's Motion for Entry of Partial Judgment on the Reversed Fee Awards and Costs, Expenses and Fees Awarded on Appeal;
- (7) Clay Street Associates LLC's Joint Response to Humphrey Industries LTD's Motion for Entry of Partial Judgment with attached declaration;
- (8) Humphrey Industries LTD's Reply in Support of Motion for Entry of Partial Judgment on the Reversed Fee Awards and Cost, Expenses and Fees Awarded on Appeal;
- (9) Clay Street Associates LLC's and the Rogels' Reply in Support of Motion for Attorney's Fees and Costs;
- (10) Oral argument of June 15, 2011;
- (11) Humphrey Industries LTD's Post-hearing Submission;
- (12) Clay Street Associates LLC's and the Rogels' Joint Response to Humphrey Industries, LTD's Post-hearing Submission;

ORDER

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

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- (13) Humphrey Industries LTD's Submission in Response to July 12, 2011 Order to Segregate Fees and Costs with Attached Declaration of David Spellman and Exhibits (A) through (C);
- (14) Clay Street Associates LLC's and Joseph and Ann Lee Rogel's Response to Humphrey Industries LTD's Fee Segregation Submission with Attached Exhibits (A) through (G);
- (15) Humphrey Industries LTD's Reply to Clay Street's Response concerning July 12, 2011 Order to Segregate Fees and Costs.

I  
History

In June, 2007, a bench trial was held before this court pursuant to RCW 25.15.475 to determine the fair value of a warehouse in Auburn, Washington owned by Clay Street Associates, LLC (Clay Street). Clay Street had attempted to sell the warehouse during 2004 but Humphrey Industries (Humphrey), one of the original Clay Street principals, objected to the proposed sale. The relationship between Humphrey and the other Clay Street principals became acrimonious, resulting in a dysfunctional LLC. Acting on the advice of counsel, Clay Street was merged into a new LLC in order to overcome Humphrey's objection and to facilitate the sale of the LLC. Humphrey dissented from the merger and demanded payment of his share of the fair value of the asset. Clay Street paid Humphrey in May, 2005, six months later than required by RCW 25.15.460. Humphrey declined the payment and the asset valuation issue became the focus of the litigation and proceeded to trial some two years later.

ORDER

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

1 Following 6 days of trial, the court determined that the LLC asset had a fair value of  
2 \$3,150,000 as of December 7, 2004, and ordered that Clay Street compensate Humphrey an  
3 additional \$60,588.62. The court also considered the assessment of fees and expenses pursuant  
4 to RCW 25.15.480 and found that Clay Street, despite being untimely in its payment of  
5 Humphrey's dissenting share in May, 2005, was in substantial compliance with RCW  
6 25.15.460. The court denied attorney's fees to Humphrey pursuant to that finding. The court  
7 awarded fees and expenses in favor of Clay Street (\$212,679.55) and to investors Joseph and  
8 Ann Lee Rogel (\$33,533.95), the court finding that Humphrey "acted arbitrarily, vexatiously or  
9 not in good faith with respect to the rights provided by this article". RCW 25.15.480 (2)(b).

10  
11  
12  
13 ~~The Court of Appeals, in an unpublished opinion, affirmed this court's findings~~  
14 concerning the valuation of the warehouse and the award of attorneys' fees and costs to Clay  
15 Street and the Rogels. Humphrey Indus., LTD. v. Clay Street Assocs. LLC, 2008 WL 5182026  
16 (Wn. App. Dec. 8, 2008). Humphrey did not challenge the findings and conclusions related to  
17 the asset valuation on appeal to the Supreme Court and they remain undisturbed. Humphrey  
18 did, however, challenge the finding that Clay Street substantially complied with the statute and  
19 the award of attorney's fees and expenses in favor of Clay Street and the Rogels.

20  
21 The Supreme Court reversed the Court of Appeals and remanded "for consideration of  
22 whether, in light of Clay Street's failure to substantially comply with the statute, Humphrey is  
23 entitled to attorney fees". Humphrey Indust. v. Clay St. Assoc., 170 Wn. 2d, 495, 509 (2010).  
24 The clerk of the Supreme Court taxed \$98,191.00 in costs, expenses and attorney fees in favor  
25 of Humphrey as the prevailing party on appeal.  
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29 ORDER

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

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II  
Attorney's Fees  
And Expenses

RCW 25.15.480 (2) provides:

The court may also assess the fees and expenses of counsel and experts for the respective parties in amounts the court finds equitable:

- (a) Against the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of this article; or
- (b) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith, with respect to the rights provided by this article.

An award of attorney's fees under the LLC Act is discretionary with the trial court. As the Supreme Court noted in its opinion, "the award of attorney fees under RCW 25.15.480(2) is not mandatory.....[t]hus even if Clay Street *did* fail to substantially comply with the 30 day statutory deadline, or if Humphrey *did* act arbitrarily, vexatiously, or not in good faith, the opposing party is not automatically *entitled* to an award of attorney fees. Rather, the decision to award attorney fees rests in the discretion of the trial court." *Id.* at 507.

A.  
Attorney's Fees and Costs  
Under RCW 25.15.480 (2)(a)

Humphrey initially argued that this court's award of \$246,213.50 fees and costs to Clay Street and to the Rogels should be reversed in his favor. \* Humphrey submits that Clay Street's

\*In response to this court's order of July 12, 2011, directing Humphrey to segregate its fees between RCW 25.15.480 2(a) and 2(b), Humphrey reduced its fees claim to \$111,542 and \$12,385.91 in costs. More recently, in Humphrey's Reply to Clay Street's Response concerning the July 12, 2011 Order to Segregate Fees and Costs, Humphrey has further discounted its fee request by 10% to \$100,388 to account for duplications and inefficiencies.

ORDER

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

1 failure to timely pay his dissenting interest adversely influenced all aspects of the  
2 litigation, including the trial itself, and that the award of fees should not be strictly limited to  
3 Clay Street's failure to comply with RCW 25.15.480 (2)(a). However, the fact that Clay Street  
4 failed to timely pay Humphrey his dissenting share did not necessarily "course" or "ripple"  
5 throughout the remainder of the litigation, as contended by Humphrey. The record shows that  
6 the dissenter's payment issue was one of several matters addressed by Judge Michael Hayden in  
7 considering Humphrey's Motion for Summary Judgment in October, 2005. On October 7,  
8 2005, Judge Hayden granted in part and denied in part the motion and noted that Clay Street  
9 "violated RCW 25.15.460 (1) in that payment was not timely made." This court later reaffirmed  
10 that order in Finding of Fact #12 following trial.  
11  
12

13  
14 Humphrey's own billings make it clear that by November, 2005, Clay Street's earlier  
15 failure to substantially comply with Section 2(a) had been settled and the parties had moved  
16 forward and focused on a number of other matters. The issues that became the focus of the  
17 litigation included Motions for Discovery, Motions to Compel, Motions for Arbitration,  
18 Motions for Injunctive Relief and other matters that were related to the valuation issue that  
19 ultimately was tried in June, 2007. It is an inaccurate portrayal of the facts and the record to say  
20 that Clay Street's failure to substantially comply with the timely payment requirement of 2(a)  
21 played a key role throughout the litigation. The billing records of Humphrey, the progression of  
22 the litigation, and the trial evidence convincingly refutes Humphrey's contention that substantial  
23 fees and costs should be paid by Clay Street due to the untimely payment in May, 2005.  
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26 While Humphrey may be entitled on remand to a reasonable attorney fee award pursuant  
27 to RCW 25.15.480(2)(a), it does not logically follow that the exact sum of fees previously  
28

29 ORDER

6

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-298-9205

1 awarded to Clay Street and to the Rogels should be reversed in favor of Humphrey. The  
2 appropriate, equitable method of determining attorney's fees under RCW 25.15.480 (2) must be  
3 based on the lodestar analysis of Humphrey's relevant billing periods. Bowers v. Transamerica  
4 Title Co., 100 Wn. 2d 581, 597, 675 P.2d 193 (1983).  
5

6 In light of the Supreme Court's ruling, if fees are to be awarded to Humphrey due to  
7 Clay Street's failure to substantially comply with the LLC Act, those fees should be for the  
8 billings of Humphrey's counsel for the relevant period May, 2005, through November, 2005,  
9 when the issue of substantial compliance with the Act was before the court. Any lodestar  
10 analysis related to the dissenter's payment issue must start with a review of the billings found in  
11 Exhibits A, B and C to Humphrey's Motion for Fees and the Declaration of David Spellman in  
12 response to this court's order of July 12, 2011 to segregate fees. This court has conducted that  
13 review.  
14

15  
16 The order of July 12, 2011, to segregate fees between the substantial compliance prong  
17 of RCW 25.15.480.2 (a) and RCW 25.15.480.2(b) was issued due to the difficulty in parsing out  
18 Humphrey's billings. Many of Humphrey's block billings covered several different tasks,  
19 requiring a more defined segregation of billings related to the litigation. For example, billing  
20 entries of 8/5/05, 8/30/05, 10/1/05 and 10/6/05 blend a number of separate litigation activities  
21 together, including such issues as arbitration, appraisal, injunctive relief, production of  
22 documents and discovery. In evaluating these billings, there were some entries (e.g. entries of  
23 6/2/05, 7/28/05 and 9/30/05) that do appear to bear upon the issue of the dissenter's payment  
24 and substantial compliance under 2(a).  
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ORDER

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

1 Humphrey argues that no reasonable segregation is possible because the billings were all  
2 related to a common core of facts. See Pannell v. Food Services of Am., 61 Wn. App. 418, 447,  
3 810 P.2d 952 (1991). Although this litigation derived from a common statutory scheme, the fees  
4 which were generated that related to the dissenter's payment issue were quite distinct factually  
5 from the many other aspects of the litigation which commanded the attention of the parties long  
6 after the dissenter payment issue had been resolved. It is clear from a review of the many  
7 billings, that much more work was billed that related to various discovery issues, arbitration,  
8 injunctive relief, and preparation for the valuation trial, than was concerned with the late  
9 payment issue.  
10  
11

12 If a defendant segregates billings and fees that is partly but not wholly persuasive, the  
13 trial court may independently decide what represents a reasonable amount of attorney's fees.  
14 Mayer v. City of Seattle, 102 Wn. App. 66, 79, 10 P.3d 408 (2000). The court has reviewed all  
15 the billings for the May-November, 2005, period submitted with counsel's declaration. The  
16 court has attempted to identify which billings were concerned with the dissenter's payment  
17 issue. For the period May, 2005 through November, 2005, the total billing for all Humphrey's  
18 fees and costs is calculated as \$74,585.52. See Humphrey's billings documented in Exhibit A  
19 and B of Spellman Declaration of July 25, 2011. The court has also reviewed the remainder of  
20 Humphrey's billing statements from November 2005 up to and including trial and has found no  
21 billings apparently related to the untimely dissenter payment issue.  
22  
23  
24

25 Guided by the lodestar method of Bowers v. Transamerica, *supra*, it appears that the  
26 rates charged by counsel for Humphrey appear to be within the reasonable market range for  
27 similarly experienced attorneys in the Seattle market. In reviewing the various billings, the  
28

29 ORDER

Judge Harry J. McCarthy  
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1 court estimates that not more than 10% of the entries during that period appear to be arguably  
2 related to the dissenter payment issue. The estimated total of billings reasonably associated with  
3 the 2(a) violation is as follows:

4  
5  $\$74,798.61$  Billings May to November 2005  
6  $\times \quad 10\%$  Attorney's fees reasonably related  
7  $\$ 7,479.86$  to late dissenter payment

8 B.  
9 Attorneys Fees & Costs  
10 Under RCW 25.15.480(2)(b)

11 1. Clay Street

12 The Supreme Court also reversed the award of fees to Clay Street and the Rogels  
13 pursuant to RCW 25.15.480 (2)(b), finding that the basis for these awards was on untenable

14 grounds. The Supreme Court found the awards were based partly on inadmissible evidence,  
15 including Humphrey's rejection of a pretrial settlement offer and a CR68 offer of judgment.

16 The Supreme Court majority opinion held that the "trial court should not have relied on  
17 Humphrey's pre-litigation conduct or conduct in other suits against Clay Street and the Rogels  
18 in awarding fees against Humphrey". 170 Wn.2d at 508.

19 In reviewing the trial evidence, the court recalls that quite apart from the evidence found  
20 inadmissible by the Supreme Court, there was significant other evidence that indicated that  
21 Humphrey acted "arbitrarily, vexatiously or not in good faith, with respect to the rights provided  
22 by this article". RCW 25.15.480 (2)(b). Specifically, Humphrey's unreasonable valuation of  
23 \$4.1 million, almost \$1 million greater than any of the other mainstream estimates, was  
24 indicative of Humphrey's arbitrariness and lack of good faith and the court so found following  
25 trial. Humphrey's baseless demand for an additional \$424,607 was evidence of his arbitrary  
26  
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28

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9

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1 motivation in dealing with Clay Street. Humphrey's insistence on this unreasonable valuation  
2 amount caused this court to question not only the legitimacy of the valuation, but also  
3 Humphrey's own credibility as a witness. In comparing the violation by Clay Street of its  
4 untimely payment of Humphrey's dissenting share with Humphrey's baseless, unreasonable  
5 valuation and his arbitrary treatment of the Rogels, it is clear that any fees awarded should on  
6 balance favor Clay Street and the Rogels. When a dissenter's demand is unreasonable and  
7 lacking in credible factual support, "the dissenter runs the risk of being assessed litigation  
8 expenses". *Wash. Business Corp. Act Comment § 13.31 ("Comment"), reproduced in Stewart*  
9 *M. Landefeld, et. al., Wash Corp. Law Corps EJLLCs App, 1-178 (2002).*  
10  
11

12  
13 However, as the Supreme Court determined, part of the trial evidence supporting the  
14 attorney's fee award to Clay Street and the Rogels was inadmissible. In evaluating the awards  
15 of attorney's fees and costs following trial, this court gave greater weight to the evidence of  
16 Humphrey's baseless valuation estimate and the unreasonable retention of the Rogels in the  
17 litigation than the inadmissible evidence. However, since part of the trial evidence supporting  
18 the finding that Humphrey acted arbitrarily and vexatiously was determined by the Supreme  
19 Court to be inadmissible, an appropriate, proportionate reduction of the fee award to Clay Street  
20 should be made. Based on a review of the trial record, including the Findings of Fact and  
21 Conclusions of Law entered following trial, it is estimated that not more than 40% of the court's  
22 ruling on attorney's fees relied upon the evidence that the Supreme Court concluded was  
23 inadmissible. Therefore, the previous award of attorney's fees and expenses \$212,679.55 Clay  
24 Street is reduced by 40% or by \$85,071.82. The reinstated award to Clay Street for attorney's  
25 fees and costs is \$127,607.73.  
26  
27  
28

29 ORDER

10:

Judge Harry J. McCarthy  
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518 Third Avenue  
Seattle, WA 98104  
206-298-9205

1 The CR68 award to Clay Street of \$24,961.55 in costs has not been challenged and is  
2 reaffirmed.

3  
4 The Rogels

5 Despite acknowledging that he had no valid reason for keeping Mr. and Mrs. Joseph  
6 Rogel in the law suit, Humphrey unreasonably insisted that they be kept in the litigation without  
7 good cause. Humphrey was aware that the Rogels were not involved in his dispute with Clay  
8 Street and should have never named them as parties. Under RCW 25.15.475, only the LLC and  
9 the dissenter are appropriate parties for a judicial valuation.  
10

11 As this court determined in unchallenged Findings of Fact, the Rogels were retired,  
12 passive investors in Clay Street who had no involvement whatever in any alleged misconduct by  
13 Clay Street. The Rogels had previously been dismissed twice as defendants in related litigation.  
14 Humphrey himself acknowledged that Mr. and Mrs. Rogel merely held funds in trust from the  
15 sale of Clay Street and were people against whom Humphrey had no claim. When the opportunity  
16 to dismiss them from this law suit was presented, Humphrey declined and required the elderly  
17 couple to defend and sit through a trial that did not involve them. This conduct of Humphrey  
18 toward the Rogels was potent evidence of Humphrey's willingness to act "vexatiously,  
19 arbitrarily and not in good faith" against Mr. and Mrs. Joseph Rogel. RCW 25.15.480 (2)(b).  
20 The court also heard evidence at trial concerning the ill will between Humphrey and Scott  
21 Rogel, the Rogel's son. It was reasonable to infer from that evidence that an acrimonious  
22 relationship existed between Humphrey and Scott Rogel and was a motivating factor in  
23 Humphrey's refusal to dismiss the Rogels from a law suit that did not concern them, causing  
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29

ORDER

1 them to accumulate expensive attorney fees and costs. Those fees and costs should in fairness  
2 be borne by Humphrey.

3  
4 The attorney's fees and cost previously ordered to be paid by Humphrey to Mr. and Mrs.  
5 Joseph Rogel are reinstated with post judgment interest at 12%.

6  
7 III  
8 PREJUDGMENT  
9 INTEREST

10 Humphrey requests an award of prejudgment interest at 12%. The law is clear that  
11 prejudgment interest is appropriate only when the amount involved is liquidated. See Stevens v.  
12 Brink's Home Sec. 162 Wn. 2d 42, 50, 169 P.3d 473 (2007); Hansen v. Ruthaus, 107 Wn. 2d  
13 468, 472, 730 P.2d 662 (1986). A liquidated claim exists when the amount can be determined  
14 with precision and without reliance on opinion or discretion. Bostain v. Food Express, Inc.,  
15 159 Wn.2d 700, 723, 153 P.3d 846 (2007). In this case, before this court can consider  
16 prejudgment interest, a number of variables remained to be decided. Before a revised judgment  
17 can be determined, the court must first exercise its discretion equitably as specified in RCW  
18 25.15.480(2).

19  
20 Humphrey concedes that prejudgment interest cannot be based upon attorney's fees due  
21 to the uncertainties in determining the final sum in such an award. Instead, Humphrey argues  
22 that the post trial award of fees to Clay Street and to the Rogels is a liquidated sum to which he  
23 is entitled on remand, entitling him to prejudgment interest. However, before any final  
24 supplemental judgment may be made, the court needs first to exercise its discretion, not only  
25 concerning a recalculation of attorney's fees in light of the Supreme Court's remand, but also to  
26 include other adjustments and offsets that may be necessary. As previously noted, simply  
27  
28

29 ORDER

Judge Harry J. McCarthy  
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206-296-9205

1 reversing fees previously awarded to Clay Street and the Rogels would not be a reasonable  
2 exercise of discretion by this Court. Further, prejudgment interest is not appropriate when an  
3 appellate court reverses a trial court judgment, requiring a new judgment to be entered. Fulle v.  
4 Boulevard Excavating, Inc., 25 Wn. App. 520 522, 610 P.2d 387 (1980):  
5

6  
7 IV  
8 Appellate  
9 Fees

10 The clerk of the Supreme Court has awarded attorneys fees, expenses and costs to  
11 Humphrey in the amount of \$98,191.00. Judgment is entered in that amount in favor of  
12 Humphrey and is to be paid by Clay Street LLC.

13 V  
14 Summary

128  
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15 IT IS ORDERED that:  
16 Humphrey is awarded \$7,479.86 in fees and costs pursuant to RCW 25.15.480 2(a).  
17 Judgment in favor of Humphrey is entered for appellate fees and costs in the amount of  
18 \$98,191.00. Judgment debtor is Clay Street LLC.  
19 Attorney's fees are entered in Clay Street LLC's favor in the reduced amount of  
20 \$127,607.73, pursuant to RCW 25.15.480 2(b). The CR68 award of costs in the amount of  
21 \$24,961.55 is reinstated.  
22 Attorney's fees and costs are to be paid by Humphrey in favor of Mr. and Mrs. Joseph  
23 Rogel in the reinstated amount of \$33,533.95, pursuant to RCW 25.15.480 2(b). All judgments  
24 shall accrue interest at 12%.  
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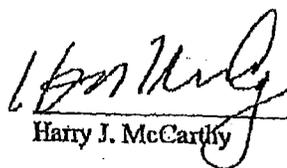
ORDER

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IT IS FURTHER ORDERED that counsel shall consult with each other in the calculation of appropriate offsets in the preparation of a presentation of final judgment.

Dated this 30 day of August, 2011.

  
Harry J. McCarthy

ORDER

14

Judge Harry J. McCarthy  
King County Superior Court  
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## **APPENDIX D**

**Extracts from Humphrey's Mot. For Fees  
and Decl. of David Spellman in  
Supp. of Humphrey's Mot. For Fees,  
Supplemental Designation.**

5/17/11

THE HONORABLE HARRY McCARTHY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

HUMPHREY INDUSTRIES, LTD.,  
  
Plaintiff,  
  
v.  
  
CLAY STREET ASSOCIATES LLC;  
SCOTT ROGEL; LORI GOLDFARB; and  
JOSEPH ROGEL and ANN LEE ROGEL,  
husband and wife,  
  
Defendants.

NO. 05-2-20201-7 SEA  
  
(Consolidated With  
05-2-24967-6 SEA)  
  
HUMPHREY'S MOTION FOR FEES  
  
JUNE 15, 2011

CLAY STREET ASSOCIATES LLC, a  
limited liability company,  
  
Plaintiff,  
  
v.  
  
HUMPHREY INDUSTRIES, LTD., a  
Washington corporation,  
  
Defendant.

HUMPHREY'S MOT. FOR FEES

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Page

1. Relief Requested. .... 1

2. Statement of Facts. .... 1

3. Issue Presented. .... 3

4. Evidence Relied Upon..... 3

5. Argument..... 3

    a. The abuse of discretion standard governs the remanded issue which is  
    "to determine whether, given Clay Street's failure to substantially  
    comply with the LLC Act, an award of fees to Humphrey is  
    appropriate." ..... 3

    b. When the supreme court opinion condemns the conduct of Clay Street  
    and its member and absolves Humphrey, it would be untenable to deny  
    a fee award in favor of Humphrey. .... 5

    c. This Court must not consider the evidence that it previously relied upon  
    and which the appellate courts ruled was inadmissible for the purpose  
    of a fee award. .... 8

    d. The equitable amount of amount fees is the amount previously awarded  
    to the defendants for fees, costs, expenses and to extinguish  
    Humphrey's liability for the expenses of the court-appointed appraiser. .... 9

6. Conclusion..... 12

1           **1. Relief Requested.** The supreme court ruled in favor of Humphrey Industries,  
2 Ltd. on the three issues that were reviewed. First, the fee award against Humphrey was  
3 reversed. Second, a supplemental judgment in favor of Humphrey for appellate fees and costs  
4 was granted.<sup>1</sup> Third, there was remanded to this Court one issue which is “whether  
5 Humphrey is entitled to attorney fees under RCW 25.15.480” in light of its reversal of this  
6 Court’s ruling that Clay Street had substantially complied with the dissenter’s rights statute,  
7 *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 170 Wn.2d 495, 509, 242 P.3d 846 (2010).

8           A fee award in favor of Humphrey is a remedy that fits both the wrong committed and  
9 the injury suffered. The supreme court has deemed that Clay Street committed an “*extreme*  
10 *delay* of its payment to Humphrey--a delay that *unquestionably violated* the 30 day statutory  
11 *deadline.*” *Id.* at 507. The opinion declares that there was a violation of “the statute’s  
12 *underlying purpose*” and observes that if anyone acted in bad faith -- it was the other members  
13 of Clay Street - not Humphrey. *Id.* at 508-09. The equitable amount for an award in favor of  
14 Humphrey is the sum previously awarded for fees, costs and expenses to Clay Street and the  
15 Rogels, or a greater amount.

16           **2. Statement of Facts.** The supreme court opinion summarizes the relevant facts  
17 and procedural history:

18                           **Facts and Procedural History**

19                   ¶ 3 Humphrey, Scott Rogel, Joseph and Ann Lee Rogel, and ABO  
20 Investments formed Clay Street in May 1997 to purchase and manage a single  
21 parcel of real property located in Auburn, Washington. Clay Street’s LLC  
22 Agreement specified that the property “shall not be sold, conveyed, and/or  
23 assigned without the mutual consent of each of the members....” Clerk’s Papers  
24 (CP) at 54. The LLC Agreement also provided for binding arbitration should a  
25 controversy or dispute related to the company’s business arise.

26                   ¶ 4 Such a dispute occurred in 2004 when Scott Rogel, in order to  
implement a property settlement reached during his divorce, sought to sell the  
property and dissolve Clay Street. Humphrey refused to consent to the sale,  
and the other members of Clay Street sought the advice of an attorney as to

<sup>1</sup> See Ex. A to Decl. of David Spellman in Supp. of Humphrey’s Mot. for Fees.

1 Official Comments, Washington's version of the Model Business Corporate Act (MBCA)'s  
2 § 13.25<sup>5</sup> (interpreting identical provision) (emphases added).<sup>6</sup>

3 The supreme court opinion emphasizes that "[t]he relevant facts of this particular case,  
4 as summarized above, indicate that Clay Street did not substantially comply with RCW  
5 25.15.460 and its purpose; Humphrey did not have anything close to "immediate" use of the  
6 \$181,192.64 . . . A six-month deferral of payment is not 'substantial compliance' with a  
7 statute that unambiguously requires payment 'within thirty days.'" *Id.* at 506. The opinion  
8 later reiterates: "Clay Street *plainly failed* to pay Humphrey the fair value of its interest in the  
9 company within 30 days of the effective date of the merger as required by RCW 25.15.460.  
10 Instead, it partially paid Humphrey that value six months later. Humphrey was thereby  
11 deprived of the immediate use of the fair value of its interest, *contrary to the underlying*  
12 *purpose of the dissenters' rights statute.* *Id.* at 508-09 (italics added).

13 The opinion notes: "It is likely that the legislature chose 30 days assuming that  
14 merging business entities would have the prudence and good faith to lay the groundwork for  
15 selling property well before a merger became effective, or seek other financing, so as to meet  
16 the statutory requirement." *Id.* at 506 n. 11. The opinion also notes that Clay Street should  
17 have taken the practical realities of marketing real estate and its one asset "into consideration  
18 in deciding whether its merger procedure could actually effect the purpose intended by its  
19 controlling members. If it could not (**and it did not**), an appropriate course of action on Scott  
20 Rogel's part may have been to ask the court approving the property settlement for an  
21

22 <sup>5</sup> A 1999 amendment to the identical MBCA provision adds a new subsection that grants a dissenter who is not  
23 timely paid the right to sue and mandates the prevailing dissenter "shall be entitled to recover fees." MBCA  
24 § 13.31(d). Humphrey's Mot. for Fees and Costs at 8:12-14, CP 1890.

25 <sup>6</sup> 2 *Principles of Corporate Governance* § 7.23(c) & cmt. e at 329 ("Mandatory Prepayment" requirement "seeks  
26 to reduce the risk of illiquidity associated with the appraisal remedy," and stating "no attempt to specify or  
negotiate fair value is required of the dissenting shareholder" and mandatory prepayment requirement "is  
principally enforced" by the fee provision that "makes the corporation liable for reasonable attorney's fees of the  
dissenting shareholders if the corporation fails to make timely payment . . .").

HUMPHREY'S MOT. FOR FEES- 6

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1 extension of time or to find a substitute for the deadlocked real estate asset.” *Id.* at 504 n. 8  
2 (bold added).

3       Based on this construction of the statutory purpose and its review of the record, the  
4 supreme court opinion concludes: “Here, the trial court found that Clay Street substantially  
5 complied with the LLC Act notwithstanding *the extreme delay* of its payment to Humphrey –  
6 a delay that *unquestionably violated* the 30 day statutory deadline. It refused to grant  
7 Humphrey fees on this basis. . . . We reverse . . . and remand for reconsideration of the  
8 denial of such fees to Humphrey.” *Id.* at 507 (italics added).

9       These quotations from the opinion are the analytic framework and identify the factors  
10 to be consider in the determination of whether an award should be made against Clay Street  
11 and its members and in favor of Humphrey. Those factors unequivocally weigh in favor of an  
12 award. Clay Street’s own trial counsel made a critical admission. While trying to explain away  
13 the additional \$85,336 paid to Clay Street’s members and how the payment to Humphrey was  
14 based on \$2.5 million while the company was rejecting purchase offers in the range of \$3 million  
15 as too low to accept, Clay Street’s trial counsel blamed Clay Street’s prior counsel who was not  
16 present at trial.<sup>7</sup> The blame game was that prior counsel went “down the wrong path” and had  
17 seen the payment obligation “as a kind of negotiation scenario, as opposed to the just come up  
18 with the right number and pay it.”<sup>8</sup> But those decisions were made by Clay Street – not its prior  
19 counsel who had provided in a memorandum the proper legal advice: “engage an appraiser to  
20 determine the value . . . The company **must** tender payment . . . within 30 days after the merger .  
21 . . .”<sup>9</sup> The right path was the immediate mandatory payment procedure – not pay later procedure.  
22 The right path required either immediate payment or the postponement of the merger.

23  
24  
25 <sup>7</sup> June 11, 2007 Tr. at 29:20-30:27, Ex. E to Spellman Decl.

26 <sup>8</sup> *Id.* at 30:9-10.

<sup>9</sup> Ex. 28 at Clay I 194 (bold added), Ex. D to Spellman Decl.

HUMPHREY’S MOT. FOR FEES- 7

1 negotiations, however, is inadmissible to prove liability for or invalidity of the claim or its  
2 amount. . . . While the dissent notes that such evidence may be admitted if offered for other  
3 purposes (ER 408), evidence of Humphrey's rejection of a pretrial settlement offer was not  
4 properly admitted." *Id.* at 508.

5 This Court's prior decision also relied upon other evidence that the supreme court  
6 concluded was improper: "The trial court should not have relied on Humphrey's prelitigation  
7 conduct or conduct in other suits against directed against Clay Street and the Rogels in  
8 awarding fees against Humphrey." *Id.* at 508. When this tainted evidence is stripped away,  
9 the supreme court opinion sets forth the applicable construction of the statute along with the  
10 factual predicates and legal analysis requiring an award of fees in favor of Humphrey.

11 d. The equitable amount of amount fees is the amount previously awarded to the  
12 defendants for fees, costs, expenses and to extinguish Humphrey's liability for  
13 the expenses of the court-appointed appraiser.

14 There is an applicable equitable maxim that "equality is equity." The maxim means  
15 "in the absence of conditions requiring a different result equity will treat all members of a  
16 class as on an equal footing, and will distribute benefits and impose burdens and charges  
17 either equally or in proportionate to several interests, and without preferences."<sup>11</sup> Humphrey  
18 merely asks to be treated equally. The material violations of the statute had a financial impact  
19 that exceeded the amount of the fair value award. As stated above, the opinion observed that  
20 a premise for the 30-day statutory deadline is business entities "would have the prudence and  
21 good faith to lay the groundwork for selling the property well before the merger became  
22 effective, or to seek other financing." *Id.* at 506 n. 11. In this case, there was other financing  
23 available. The company's manager (Ostroff) testified: "the members collectively of the  
24 company could have" paid the fair value and "I probably could have." Ostroff Dep. at 71:1-  
25 72:13 (quoted in Humphrey's Trial Br. at 27, CP 1378).

26 <sup>11</sup> 30A C.J.S. *Equity* § 135 at 423 (2007).

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1 Another option was to hold on to the property. While Humphrey was paid on a \$2.5  
2 million fair value which this Court later adjusted upward to \$3.1 million, the property was  
3 resold in April 2008 for \$4.85 million the year after trial. See Statutory Warranty Deed  
4 Recorded under 200841002329 at page 1 ("Sale \$4,800,000.00."), Ex. F to Spellman Decl.  
5 Holding onto the property would have been financially beneficially and consistent with the  
6 LLC Agreement's specified duration and requirement that the property be sold only upon  
7 unanimous consent.

8 Another option was to restart the merger process to coincide with the closing of the  
9 purchase and sale transaction. If the company lacks the funds to make the mandatory  
10 payment on the date when "the proposed merger becomes effective," the company's remedy  
11 is to restart the merger process and "send a new dissenters' notice . . . and repeat the payment  
12 demand procedure." RCW 25.15.465. This "creates no hardship for the corporation, since  
13 . . . it may . . . start the process over again at any time." Model Business Corporation Act  
14 § 13.28, annotation, CP 2040. Other than the miniscule transaction cost of resending the  
15 notices, the only detriment is that the majority owners must share with the dissenter any  
16 appreciation in the company's value that occurs during the period of delay. If Clay Street had  
17 restarted the merger process to comply with the statutory requirement and had paid Humphrey  
18 the same amount as the other members, Humphrey would have received \$266,529 instead of  
19 \$181,192.64 -- an additional \$85,336 of cash in the pocket. Humphrey also lost the  
20 opportunity to invest the funds in a rising market as is reflected by the appreciation of the  
21 property from the \$3.3 million sale to \$4.85 million resale. It is clear that the statutory  
22 violations caused Humphrey financial injury. To add insult to injury, this Court awarded Clay  
23 Street \$212,680 in fees, costs and expenses and the Rogels an additional \$33,534, which  
24 Humphrey promptly paid. An award for the same amount or a greater amount in favor of  
25 Humphrey is warranted.

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HUMPHREY'S MOT. FOR FEES- 10

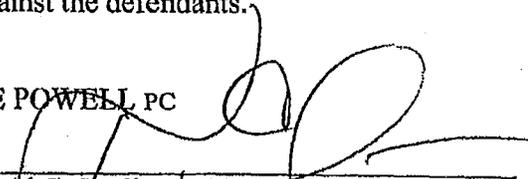
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**6. Conclusion.**

The law of the case is Clay Street's actions violated the underlying purpose of the statute and of the LLC Agreement. Its actions caused a ripple effect that coursed throughout this litigation. Even after the partial summary judgment was granted against Clay Street, Clay Street failed to mitigate the loss by making an additional payment to Humphrey. Instead, Clay Street amplified its errors and relied upon evidence that the supreme court ultimately deemed inadmissible or improper. The belated remedy to partially right this wrong is a fee award for at least the same amount granted to Clay Street and the Rogels. A lesser sum would be inequitable.

Since the inception of this suit, Clay Street has been an inactive company whose assets had been directly transferred to its members and all funds were liquidated in November 2006.<sup>15</sup> With those transfers went the attendant liability that flows to the individual members and supports the imposition of a constructive trust. The complaint requests this kind of relief, and so does this motion. For these reasons and additional ones, Humphrey should be granted \$246,214 for its pretrial, trial, and post trial fees against the defendants.

DATED: May 19, 2011

LANE POWELL PC  
By   
David C. Spellman, WSBA No. 15884  
Stanton P. Beck, WSBA No. 16212  
Andrew Gabel, WSBA No. 39310  
Attorneys for Plaintiff Humphrey Industries, Ltd.

<sup>15</sup> Ex. G to Spellman Decl.

MEMORANDUM

July 14, 2004

To:	Gerry Ostroff
From:	George T. Cowan
Subject:	Clay Street Associates, LLC Proposed Merger Transaction

A majority of the members of Clay Street Associates, LLC desire to sell the real property interests held by the company, but are frustrated by a provision in the Operating Agreement which requires a unanimous approval of all members. A sole, dissenting member refuses to permit the property to be sold.

The proposed transaction contemplates the approval of a plan of merger pursuant to which Clay Street Associates, LLC will be merged into a new entity comprised of the same members, except that the three members desiring to sell the property will have voting interests and the dissenting member will be issued non-voting interests. The economics of the membership interests in the new entity will otherwise be identical with respect to all members.

While Clay Street Associates, LLC requires a unanimous vote to approve a sale of transfer of the property, it does not address mergers. Section 25.15.400 of the Washington Limited Liability Company Act authorizes approval of a plan of merger by members contributing more than 50% of the contributions made to the LLC. Pursuant to Section 25.15.430(2), the dissenting member is not entitled to challenge the merger unless it fails to satisfy the procedural requirements or is fraudulent with respect to the member or the company.

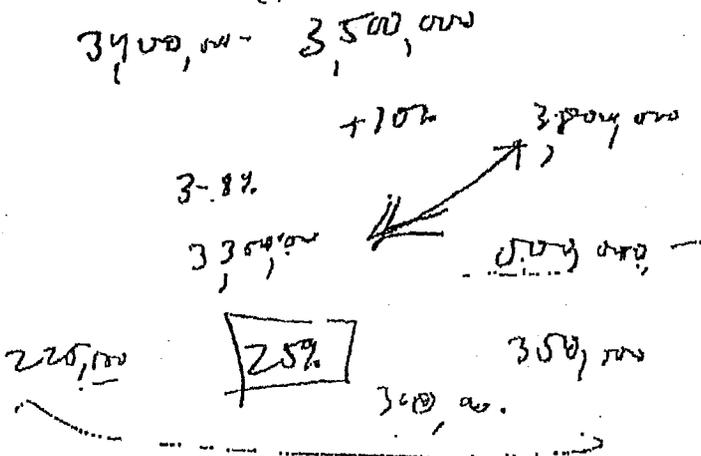
Following the procedural requirements of the statute, the three members desiring to sell the property will present and approve by a vote of members contributing 75% of the contributions to Clay Street Associates, LLC the plan to merge into the newly formed LLC. If a dissenting member approves the merger, he will be entitled to receive a non-voting interest in the new LLC and, ultimately, his percentage in the net proceeds from the sale of the property. If he does not vote in favor of the merger and exercises his rights as a dissenting member under Article XII of the Washington Limited Liability Company Act, he will be entitled to be paid the fair value of his ownership interest in Clay Street Associates, LLC. We do not know which course the dissenting member will pursue, but believe he will actually be better off economically by approving the merger and taking his percentage of the net proceeds. If he exercises rights as a dissenting member, he will be paid the value of his interest in the company, which we will have determined by appraisal. The appraisal will include a discount for the minority interest factor.

CLAY1000118

EXHIBIT D

### LLC MERGER PROCEDURE

1. Send the proposed Plan of Merger to all members, together with a copy of the certificate of formation and operating agreement for the new LLC, and a copy of Article XII of the Washington Limited Liability Company Act ("Dissenters Rights"). This will be sent 10 days prior to the proposed date for approval of the merger.
2. Approve the Plan of Merger 10 days later, with all members of the new entity signing an approval form, and 3 of the 4 members of Clay Street Associates, L.L.C. signing an approval form.
3. File Articles of Merger, which will confirm the effective date of the merger as 90 days following the filing date.
4. Within 10 days following approval of the plan of merger, send a dissenters' notice to all voting members who did not vote in favor of approval, and any other member who had no right to vote on the plan of merger, that payment must be demanded within 30 days following the date of the notice, and providing a form for making demand.
5. If payment is demanded, the company will engage an appraiser to determine the value of the dissenter's interest in Clay Street Associates, L.L.C. The company must tender payment of the value of the interest, plus interest from the effective date of the merger, within 30 days after the merger becomes effective. An explanation of the calculations, financial statements, and a copy of the dissenters' rights provisions are to accompany payment.
6. Within 60 days following payment, the dissenter can notify the company of his estimate of fair value and demand the difference. Absent such a timely demand, he waives rights to make demand for additional payments.
7. If the dissenter makes a demand for additional payment, the company must either initiate a lawsuit within 60 days of receiving the demand, asking the court to determine fair value of the dissenter's interest, or pay the additional sum demanded.





CHICAGO TITLE CO  
PAGE 001 OF 005  
04/14/2008 15:22  
KING COUNTY, WA

WHEN RECORDED RETURN TO  
116 CLAY STREET LLC  
8805 NE BELLE HILL ROAD  
BAINBRIDGE ISLAND, WASHINGTON 98110

**E2341474**  
04/14/2008 15:21  
KING COUNTY, WA  
TRX  
SALE \$36,325.00  
\$4,050,000.00

PAGE 001 OF 001

 **CHICAGO TITLE INSURANCE COMPANY**

1250096

**STATUTORY WARRANTY DEED**

**THE GRANTOR(S)**  
FAVRO INVESTMENTS, L.L.C, A WASHINGTON LIMITED LIABILITY COMPANY AND FAVRO INVESTMENTS, LLC, A WASHINGTON LIMITED LIABILITY COMPANY, SUCCESSOR BY MERGER TO F & C INVESTMENTS I, LLC, AS THEIR INTEREST MAY APPEAR:

for and in consideration of  
TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION INCLUDING GRANTOR'S RELINQUISHMENT OF PROPERTY UNDER IRC 1031 AND GRANTEE'S REPLACEMENT PROPERTY UNDER IRC 1031

in hand paid, conveys and warrants to  
116 CLAY STREET LLC, A WASHINGTON LIMITED LIABILITY COMPANY

the following described real estate situated in the County of KING State of Washington:

LEGAL DESCRIPTION ATTACHED HERETO AS EXHIBIT "A" AND BY THIS REFERENCE MADE A PART HEREOF AS IF FULLY INCORPORATED HEREIN.

SUBJECT TO: THAT CERTAIN DEED OF TRUST WHICH GRANTEE ASSUMES AND AGREES TO PAY DATED MAY 9, 2005 IN WHICH FAVRO INVESTMENTS LLC AND F&C PARTNERSHIP #1 ARE THE GRANTORS AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR WELLS FARGO BANK, NATIONAL ASSOCIATION IS THE BENEFICIARY RECORDED MAY 16, 2005 AS AUDITOR'S FILE NO. 20050516002093.

SUBJECT TO: EXCEPTIONS SET FORTH ON ATTACHED EXHIBIT "B" AND BY THIS REFERENCE MADE A PART HEREOF AS IF FULLY INCORPORATED HEREIN.

PORTION OF LOTS 5-7, BLOCK C, VOLUME 10 OF PLATS, PAGE 33

**Tax Account Number(s):** 446340-0160-04

Dated: APRIL 8, 2008  
FAVRO INVESTMENTS, L.L.C, A WASHINGTON LIMITED LIABILITY COMPANY

  
BY: PAUL A. FAVRO, MANAGING MEMBER

 CHICAGO TITLE INS. CO.  
REF# 1250096-6

LPB19/K1C/052006

STATE OF WASHINGTON  
COUNTY OF KING

88

I CERTIFY THAT I KNOW OR HAVE SATISFACTORY EVIDENCE THAT PAUL A. FAVRO IS THE PERSON WHO APPEARED BEFORE ME, AND SAID PERSON ACKNOWLEDGED THAT HE SIGNED THIS INSTRUMENT, ON OATH STATED THAT HE WAS AUTHORIZED TO EXECUTE THE INSTRUMENT AND ACKNOWLEDGED IT AS MANAGING MEMBER OF FAVRO INVESTMENTS, LLC TO BE THE FREE AND VOLUNTARY ACT OF SUCH PARTY FOR THE USES AND PURPOSES MENTIONED IN THE INSTRUMENT.

DATED: April 10, 2007

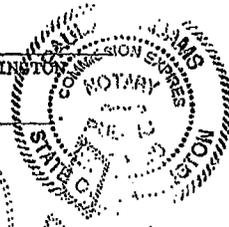
NOTARY SIGNATURE:

PRINTED NAME: Paula K. Adams

NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON

RESIDING AT Kirkland

MY APPOINTMENT EXPIRES 1-27-09



Document

NOTARY PDA/02103

LAW OFFICES OF  
MCNAUL EBEL NAWROT & HELGREN  
A PROFESSIONAL LIMITED LIABILITY COMPANY

600 UNIVERSITY STREET, SUITE 2700  
SEATTLE, WASHINGTON 98101-3143  
(206) 467-1816

RECEIVED

NOV 17 2006

LANE POWELL PC

GREGORY J. HOLLON

Direct (206) 389-9348

E-MAIL: GHOLLON@MCNAUL.COM  
FACSIMILE: (206) 624-5128

November 16, 2006

Mr. David C. Spellman  
Lane Powell PC  
1420 Fifth Avenue, Suite 4100  
Seattle, Washington 98101

Re: *Clay Street Associates/Humphrey*

Dear David:

We are holding in trust \$21,457.28 for WXYZ, LLC – the successor in interest to Clay I, LLC. George Humphrey does not appear to have any interest in these funds. However, in an abundance of caution I am writing to give you advance notice per Judge Hayden's order concerning distribution of LLC funds that the WXYZ funds will be distributed to pay for legal services.

Please do not hesitate to call if you have any questions.

Sincerely,



Gregory J. Hollon

GJH:bz

cc: Gerry Ostroff

**EXHIBIT G**

Appendix 47



DAVID C. SPELLMAN  
206.223.7392  
spellmand@lanepowell.com

November 17, 2006

Gregory J. Hollon, Esq.  
Gregory G. Schwartz, Esq.  
McNaul Ebel Nawrot & Helgren  
600 University Street, Suite 2700  
Seattle, WA 98101-3143

Re: Humphrey/Clay  
KCSC Nos. 05-2-20207-7SEA & 05-2-24967-6SEA  
Our File No. 120,144.004

Re: Seven Days Notice of Disbursement of Trust Funds

Dear Mr. Hollon and Mr. Schwartz:

On October 9, 2006, Mr. Schwartz notified us that \$31,072.49 was held in trust by Mr. Holmes's firm. That day, Mr. Holmes also gave notice that \$9,635.00 would be disbursed within one week from the trust account.

Today, I received a November 16, 2006 letter from Mr. Hollon stating "we are holding in trust \$21,457.28 for WXYZ, LLC." The letter states that the WXYZ funds "will be distributed to pay for legal services." Please confirm in writing or by email that the disbursement will result in the complete liquidation of the trust fund.

Finally, your assertion that George Humphrey has no interest in the trust funds is legally correct. However, Humphrey Industries does have an interest in the trust funds and the complete liquidation of the trust funds raises additional claims and remedies.

Very truly yours,

LANE POWELL PC

David C. Spellman

**EXHIBIT G**

/dcs

Gregory J. Hollon, Esq.  
Gregory g. Schwartz, Esq.  
November 17, 2005  
Page 2

Stanton Phillip Beck  
Mary Jo Heston  
Ann S. Humphreys  
120144.0004/1341322.1

**EXHIBIT G**

Appendix 49

# **APPENDIX E**

Extracts from Humphrey Industries Ltd.'s  
Post-Hearing Submission,  
Supplemental Designation. .

THE HONORABLE HARRY MCCARTHY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

HUMPHREY INDUSTRIES, LTD.,

Plaintiff,

v.

CLAY STREET ASSOCIATES LLC; et al.

Defendants.

CLAY STREET ASSOCIATES LLC, a limited liability company,

Plaintiff,

v.

HUMPHREY INDUSTRIES, LTD., a Washington corporation,

Defendant.

NO. 05-2-20201-7 SEA

(Consolidated With  
05-2-24967-6 SEA)

HUMPHREY INDUSTRIES LTD'S POST-HEARING SUBMISSION

NOTED FOR JUNE 15, 2011

HUMPHREY'S POST-HEARING SUBMISSION

Appendix 51

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1. **Prejudgment Interest.** At the hearing, counsel for defendants handed out *Weyerhaeuser Co. v. Comm. Union Ins. Co.*, 142 Wn2d 654, 15 P.3d 115 (2001) for the proposition that prejudgment interest is not recoverable on attorney's fees. That decision applies to only one of Humphrey's three requests. Any amount that the court may grant in the reconsideration of a possible fee award in favor of Humphrey is not a liquidated sum and hence prejudgment interest cannot attach to that sum. Humphrey has not asked for interest on that award. But Humphrey does request interest on the amounts to be repaid. In November 2007, Humphrey paid \$123,754.78 to Clay Street and the \$33,533.95 to the Rogels to satisfy the judgment that has been reversed. These amounts are liquidated. Interest on those sums runs from the date of the original judgment. *Fulle v. Boulevard Excavating, Inc.*, 25 Wn. App. 520, 522, 610 P.2d 387, *reviewed denied*, 93 Wn.2d 1030 (1980) ("Where the appellate court merely modifies the trial court award and the only action necessary in the trial court is compliance with the mandate, interest runs from the date of the original judgment."), which was cited in Reply in Supp. of Humphrey's Mot for Partial Summ. J. at 4:1-6 & n. 4, Doc. 401.

2. **The Supreme Court's Review.** At the hearing, Humphrey referenced RAP 13.7(b) (Scope of Review)'s last sentence and the Drafter's Comment to 1994 Amendment to RAP 13.7(b). The rule and comment are attached here as Attachment A (RAP 13.7(b) together with 3 *Wash. Practice* at 213-214). The last sentence of subsection (b) confirms the supreme court has the option to consider and decide issues that the court of appeals did not consider. In this case, Humphrey raised as issues on appeal both the fee award against Humphrey and the denial of a fee award in favor of Humphrey. But even if Humphrey had

HUMPHREY'S POST-HEARING SUBMISSION - 1

1 not raised both issues, the supreme court had inherent authority to consider and decide all  
2 issues. *See State v. Cantu*, 156 Wn.2d 819, 822 n. 1, 132 P.3d 725 (2006) (“[T]his court has  
3 inherent authority to consider issues not raised by the parties if necessary to reach a proper  
4 decision.”). For the same reasons, the supreme court has the inherent authority to decide and  
5 reject subissues, or to base its holding on alternative grounds for affirmance and reversal, and  
6 to determine the facts relevant to the appeal.

7  
8 **3. Attachment B contains the two decisions about the advice of counsel**  
9 **defense as not excusing a breach of a duty.**<sup>1</sup> These were referenced at the hearing and were  
10 cited in prior pleadings including Appellant’s Reply Brief at 14 n. 33.

11 **4. Reversal of the Award in Favor of the Rogels and the Basis for an Award**  
12 **Against Individual Members.** Attachment C is a set of extracts from the appellate briefings  
13 where those issues were raised on appeal. Humphrey asserted statutory and common law  
14 claims and remedies against individual members since the company was dissolved, the other  
15 members paid first and before creditors like Humphrey. *See, e.g.,* Appellant’s Revised Br. at  
16 19 n. 45.<sup>2</sup> The individual members joined in the Respondents’ Supplemental Brief in the  
17 supreme court. They did not invoke nominal party status under RAP 14.2.

18  
19 **5. The false statements in Court and in Pleadings (“it remains undisputed**  
20 **that Humphrey stubbornly adhered to an unsupportable \$4.1 million buyout figure, Ex.**  
21 **A to FOF 39, 40, 44, and thereby forced Clay Street and the Rogels to participate in a**  
22

23 <sup>1</sup> *Green v. McAllister*, 103 Wn. App. 452, 468-69, 14 P.3d 795 (2000) (advice of counsel not  
24 excusable for breach of fiduciary duty that constitutes constructive fraud; disposing  
25 partnership assets was a breach of fiduciary duty and was constructive fraud); *Hines v. Data*  
26 *Line, Sys., Inc.*, 114 Wn.2d 127, 147, 787 P.2d 8 (1990) (reliance on advice of counsel does  
not apply to director’s duty to disclose material facts under Washington State Securities Act).

<sup>2</sup> *Accord, Green v. McAllister*, 103 Wn. App. at 468 (constructive fraud).

1 costly trial . . .”<sup>3</sup> Clay Street did not act honorably when it made these assertions.  
2 Attachment D are *pretrial* pleadings confirming Humphrey’s adoption of the appraisers’  
3 values long before trial. The statutory presumption is that Clay Street bore the appraiser fees  
4 unless the company could prove the exception to the presumption (if Humphrey acted  
5 arbitrarily, vexatiously or not in good faith in “demanding payment.” RCW 25.48.475(1)).  
6 The attached pleadings confirm that the trial evidence about Humphrey’s prelitigation  
7 estimate and its adoption of the value of the appraisers was to demonstrate that the  
8 presumption regarding costs applied, and hence the company bore the expense of the  
9 appraisal. It is tragic that Humphrey’s estimate of the intrinsic value of the property, which  
10 could be sold only upon unanimous consent, was spot-on since the property later sold for \$4.8  
11 million.  
12

13 In summary, defendants’ request for judicial nullification of the supreme court opinion  
14 is improper. Their statements about Humphrey’s position are not supported by the record  
15 and, indeed, are contradicted by the record. Humphrey requests the court to honor the spirit  
16 of the supreme court’s recitation of the relevant facts, its rulings, and its holdings, and to  
17 rectify the integrity of the process in light of defendants’ efforts to “bypass the dissenters’  
18 rights statute and section 8.1 of their LLC Agreement, which specifies the property, “shall not  
19 be sold, conveyed, and/or assigned without the mutual consent of each member.”” *Humphrey*  
20 *Indus., Ltd. v. Clay St. Assocs.*, 170 Wn.2d 495, 508, ¶ 24 (2010).  
21

22 Submitted this 17<sup>th</sup> day of June 2011. .  
23

24 <sup>3</sup> Compare Clay St. Assoc.’s and Joseph and Ann Lee Rogels’ Mot. for Atty Fees and Costs at  
25 8:36; *id.* at 9:14-19 (“Humphrey’s dogged adherence to an untenable demand . . . is reason by  
26 itself, to reinstate Clay Street’s and the Rogels’ statutory fee and award costs.”); *id.* at 7:10-  
12; *id.* at 4:13-19 with Attachment C.

HUMPHREY’S POST-HEARING SUBMISSION - 3

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LANE POWELL PC

By s/David C. Spellman  
David C. Spellman, WSBA No. 15884  
Stanton P. Beck, WSBA No. 16212  
Andrew J. Gabel, WSBA No. 39310  
Attorneys for Plaintiff  
Humphrey Industries, LLC

HUMPHREY'S POST-HEARING SUBMISSION - 4

Appendix 55

120144.0004/5106669.1

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101  
(206) 223-7000

AX 00246

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2011, I caused a copy of the foregoing document to be served on the following persons in the manner indicated below at the following addresses:

<p>GREGORY HOLLON McNaul, Ebel 600 University Street, Suite 2700 Seattle, WA 98104 WSBA 26311 Attorney for Clay Street Assoc Tele: (206)467-1816. <a href="mailto:ghollon@mcnaul.com">ghollon@mcnaul.com</a></p>	<p><input type="checkbox"/> by CM/ECF <input checked="" type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery</p>
<p>ALAN B. BORNSTEIN 999 Third Avenue, Suite 1900 Seattle, WA 98104 WSBA 14275 Attorney for Joseph &amp; Ann Lee Rogel Tele: (206) 292-1994 <a href="mailto:abornstein@jbsl.com">abornstein@jbsl.com</a></p>	<p><input type="checkbox"/> by CM/ECF <input checked="" type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery</p>

s/ Nicole A. Grace  
Nicole A. Grace

## **Attachment B**

At 12-13

Westlaw.

14 P.3d 795  
103 Wash.App. 452, 14 P.3d 795  
(Cite as: 103 Wash.App. 452, 14 P.3d 795)

Page 1

▷

Court of Appeals of Washington,  
Division 3,  
Panel Nine.

Harry A. GREEN and Jann H. Green, husband and  
wife, Appellants,

v.

K. David McALLISTER, individually and as general  
partner of B.W.M. Investments and Academy In-  
vestors; A.E. Brim, individually and as general  
partner of B.W.M. Investments and Academy In-  
vestors; James M. Williams, individually and as  
general partner of B.W.M. Investments and  
Academy Investors; B.W.M. Investments, an Ore-  
gon general partnership; Brim Enterprises, Inc., a  
corporation; Academy Investors, a general partner-  
ship, Respondents and Cross-Appellants.

No. 18526-5-III.

Nov. 9, 2000.

As Amended on Clarification Nov. 22, 2000.

Partner brought suit against his former partners  
and their partnership seeking accounting and al-  
leging breach of agreement of understanding con-  
cerning development of real estate, in failing to  
continue funding of project and in transferring  
property to partnership controlled by his former  
partners. Jury returned special verdict determining  
value of property on date of partnership dissolution,  
finding breach of contract, and setting damages for  
breach at \$785,000. The Superior Court, Spokane  
County, Linda G. Tompkins, J., awarded damages  
in accounting action, awarded prejudgment interest  
from date of dissolution, found that former partners  
did not breach fiduciary duty, denied attorney fees  
on fiduciary duty claim, and granted remittitur, re-  
ducing jury's contract damages from \$785,000 to  
\$205,000. Partner appealed remittitur and denial of  
attorney fees for fiduciary breach. Partnership  
cross-appealed. The Court of Appeals, Sweeney, J.,  
held that: (1) grant of remittitur where evidence  
supported damages in breach of contract verdict

was error and breached right to jury trial; (2) breach  
of contract was not excused by possibility that other  
partners might have been able to dissolve corpora-  
tion if breach had not occurred (3) partners commit-  
ted breach of fiduciary duty that amounted to con-  
structive fraud; (4) reliance on advice of counsel  
did not excuse breach; (5) evidence was sufficient  
to support advisory verdict and court findings re-  
garding value of land; and (6) withdrawing partner  
was entitled to prejudgment interest in accounting  
action.

Affirmed in part, reversed in part and re-  
manded.

West Headnotes

[1] New Trial 275 ⇨ 162(1)

275 New Trial

275III Proceedings to Procure New Trial

275k162 Remission or Reduction of Excess  
of Recovery

275k162(1) k. In general. Most Cited Cases  
Evidence is reviewed de novo when a trial  
court reduces a verdict. West's RCWA 4.76.030.

[2] New Trial 275 ⇨ 162(1)

275 New Trial

275III Proceedings to Procure New Trial

275k162 Remission or Reduction of Excess  
of Recovery

275k162(1) k. In general. Most Cited Cases  
The trial court has no discretion to reduce ver-  
dict if the verdict is "within the range" of the cred-  
ible evidence. West's RCWA 4.76.030.

[3] New Trial 275 ⇨ 162(1)

275 New Trial

275III Proceedings to Procure New Trial

275k162 Remission or Reduction of Excess

that Sharp Avenue would have been vacated absent the breach, \*\*803 because vacation was not only contemplated but actively sought, and was within the partnership's power to accomplish. The jury could have found from the evidence that a 390-unit development was the highest and best use of the property and should form the basis of Green's damages.

[11] The remittitur then deprived Green of his constitutional right to a trial by jury. *Softe v. Fibreboard Corp.*, 112 Wash.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989). The record contains ample evidence to support the jury's damage award. The verdict must be reinstated.

#### DEFENSE-INEVITABLE PARTNERSHIP DISSOLUTION

[12] B.W.M. contends for the first time on appeal that the applicable partnership act, former RCW 25.04, repealed by Laws of 1998, ch. 103, § 1308 (effective January 1, 1999), precludes Green's breach of contract claim. B.W.M. argues that, even if it had honored the Letter of Understanding and made the required loans, Green would have been obliged to assign his interest in the partnership in exchange. Former RCW 25.04.310(c) allows non-assigning partners to dissolve the partnership without the consent of partners who have assigned their interest without \*466 violating the partnership agreement. Absent the breach, therefore, the partners would have lawfully dissolved the partnership under .310(c), and Green would have ended up in the same position. Therefore, he is not entitled to contract damages.

Green responds that speculation as to what might have happened if B.W.M. had honored its contract obligation is irrelevant. B.W.M. breached the agreement by not fronting Green's contribution. Green did not, therefore, assign his interest. Former RCW 25.04.310(c) does not then relieve B.W.M. of its liability for breach.

First, we need not review this claim because it was not raised in the trial court. RAP 2.5(a); *State*

*v. Davis*, 41 Wash.2d 535, 250 P.2d 548 (1952). But it has no merit anyway.

B.W.M. correctly states the substance of former RCW 25.04.310(c). But its relevance here is unclear.

This would be a different lawsuit if B.W.M. had honored the contract and dissolved the partnership lawfully. *See Ashley v. Lance*, 80 Wash.2d 274, 278, 493 P.2d 1242, 62 A.L.R.3d 962 (1972) (rejecting similar argument that making partnership dissolution retroactive would resolve dispute over breach of partnership agreement).

The record contains ample evidence that the Letter of Understanding was an enforceable partnership agreement. Most of this evidence was elicited from Green on cross-examination. B.W.M. tried unsuccessfully to prove the Letter of Understanding was not a contract. RP at 754-78. Green also testified that for seven years the partners conducted themselves as if bound by the Letter of Understanding.

The partnership act does not preclude Green's contract claim.

#### "ADVICE OF COUNSEL" DEFENSE-BREACH OF FIDUCIARY DUTY

Green contends that the trial court erred by denying attorney fees based on its erroneous conclusion of law that \*467 reliance on advice of counsel was an excuse. B.W.M. responds that Green failed to prove breach of fiduciary duty and the court then properly concluded that there was no fiduciary breach as a matter of law.

[13] The court concluded it lacked authority to award fees as a matter of law, applying the fiduciary provisions of the former partnership act, RCW 25.04. RP at 485. We review this conclusion de novo. *Dempere v. Nelson*, 76 Wash.App. 403, 406, 886 P.2d 219 (1994). However, a fiduciary's breach does not mandate an award of fees. The choice is left up to the sound discretion of the court.

*Kelly v. Foster*, 62 Wash.App. 150, 155, 813 P.2d 598 (1991). The amount of allowable attorney fees is within the discretion of the trial court, and we will overturn the award only if there exists a manifest abuse of discretion. *Hsu Ying Li v. Tang*, 87 Wash.2d 796, 801, 557 P.2d 342 (1976) \*\*804 (partnership fiduciary breach; trial court's award of half the fees upheld).

[14][15] Partners stand in a fiduciary relationship to each other and have an obligation to act in the utmost good faith. *Tang*, 87 Wash.2d at 800, 557 P.2d 342. Every partner must account to the partnership and hold as trustee for it any benefit or profit from any transaction connected with the liquidation of the partnership. Former RCW 25.04.210(1).

[16] The court's conclusion that B.W.M. committed no fiduciary breach is inconsistent with the record and its own unchallenged findings that the partners secretly engaged an appraiser, paid for his services with partnership funds, did not inform Green of the result, secretly transferred the asset, and forced Green out of the partnership by means of the capital call. CP at 451-54. Unchallenged findings of fact are verities on appeal. *Davis v. Dep't of Labor & Indus.*, 94 Wash.2d 119, 123, 615 P.2d 1279 (1980).

[17] **Constructive Fraud.** Conduct that is not actually fraudulent but has all the actual consequences and legal effects of actual fraud is constructive fraud. *Dexter Horton Bldg. Co. v. King County*, 10 Wash.2d 186, 191, 116 P.2d 507 (1941). Breach of a legal or equitable duty, *irrespective of moral guilt*, is "fraudulent because of its tendency \*468 to deceive others or violate confidence." BLACK'S LAW DICTIONARY 314 (6th ed.1990). This court has defined constructive fraud as failure to perform an obligation, not by an honest mistake, but by some "interested or sinister motive." *In re Estate of Marks*, 91 Wash.App. 325, 336, 957 P.2d 235, review denied, 136 Wash.2d 1031, 972 P.2d 466 (1998).

[18][19] Disposing of partnership assets in an attempt to divest another partner of his interest in the property is a breach of fiduciary duty that constitutes constructive fraud. *Tang*, 87 Wash.2d at 800, 557 P.2d 342. Here, B.W.M.'s attempt to deprive Green of his interest in the land constitutes constructive fraud. The breach of fiduciary duty was established.

[20][21] The court found the conduct excusable because the partners relied on advice of counsel. This is error. "One cannot discharge a duty by remaining ignorant of what that duty entails." *Senn v. Northwest Underwriters, Inc.*, 74 Wash.App. 408, 416, 875 P.2d 637 (1994). Ignorance of the affairs of a business to which one owes a duty of diligence, care and skill is not a defense from liability for fraud or malfeasance. *Id.* "Mere passivity and disavowal of knowledge alone do not and should not constitute a pass to freedom from responsibility." *Id.* at 417, 875 P.2d 637.

[22] Parties generally pay their own fees. *Mellor v. Chamberlin*, 100 Wash.2d 643, 649, 673 P.2d 610 (1983). Attorney fees may, however, be authorized by a recognized ground of equity. *Pennsylvania Life Ins. Co. v. Dep't of Employment Sec.*, 97 Wash.2d 412, 645 P.2d 693 (1982). Breach of partnership fiduciary duty is such an equitable ground.

[23][24] Generally, even when breach of fiduciary duty is established, the court has discretion to award attorney fees. *Tang*, 87 Wash.2d at 799, 557 P.2d 342. Especially when the plaintiff is suing to recover for himself alone, fiduciary breach does not mandate an award of attorney fees. *Kelly*, 62 Wash.App. at 155, 813 P.2d 598.

[25] However, the innocent partner is entitled to his fees if the conduct constituting the breach violates the partnership agreement, or is "tantamount to constructive fraud." \*469 *Tang*, 87 Wash.2d at 800, 557 P.2d 342; *Brougham v. Swarva*, 34 Wash.App. 68, 72, 661 P.2d 138 (1983). "A partner should share the expense of a lawsuit when he

**FEE AWARD TO ROGELS WAS LITIGATED  
ON APPEAL AS WAS THE THEORIES OF  
LIABILITY AGAINST THE INDIVIDUAL  
MEMBERS**

**Attachment C**

**BRIEF OF APPELLANT HUMPHREY ON FEE  
AWARD TO THE ROGELS**

5. The Trial Court Erred In Awarding Fees to Joseph and Ann Lee Rogel Under the Dissenters' Rights Statute, When All Claims Against Them Were Stayed Pending Arbitration Two Years Earlier. Conclusion (1) (CP 2331:10-13) erroneously ruled Humphrey was liable for the Joseph and Ann Lee Rogel's legal fees under the dissenters' rights statutory fee provision, RCW 25.15.480(2)(b). This was yet another clear error. There were no statutory claims pending or asserted against the Rogels. Two years earlier the Rogels joined in a motion to compel arbitration (CP 320, joinder) and filed an additional brief that "distinguished 'the dissenter's Clay appraisal claim' from 'breaches of fiduciary duties against Clay I and other members.'" CP 1997:11-14. Judge Hayden granted an order that compelled arbitration of the nonstatutory breach of fiduciary duty claims but stayed any arbitration and permitted trial on the statutory appraisal remedy. CP 342-44 (Order); see also CP 2001-02 (Opp. to Fee Motion arguing claims were stayed). The order's title was clear: "Order Granting Motion to Stay Arbitration of Appraisal Rights and Granting Motion to Compel Arbitration on Other Claims Relating to Clay Street." Id. When asked a year later, Humphrey's counsel responded the Rogels were not a party -- the personal claims had been stayed<sup>62</sup> and the discovery responses unequivocally confirmed just that.<sup>63</sup>

<sup>62</sup> CP 2004 (Sept. 16, 2006 email to Rogel's counsel ["the stay affected all obligations in the lawsuit. . . the liquidated status of the company was pleaded in the complaint. There is a statutory presumption that members owe creditors a fiduciary duty."])

E. The Trial Court Erred In Concluding \$3.15 Million Was the Fair Value. The Ruling Imposes Multiple Penalties On the Dissenter, Is Contradicted by Market Actions, Ignores Misinformation Given to the Market and Clay Street's Appraiser, Results in a Transfer of Wealth and Rewards the Company For its Violations of the Statute.

When the valuation is not supported by the evidence or the trial court has given undue weight to a factor, Washington appellate courts will reverse a trial court's valuation decision.<sup>64</sup>

Here, while arriving at a putative "fair value," the trial court made a cascading series of prejudicial errors, including errors of law. First, the trial court refused to permit George Humphrey to offer expert testimony (VRP 233-44), because his CPA status was inactive and allegedly because he had not been disclosed as an expert witness. In fact, an inactive CPA may perform non-public services,<sup>65</sup> and his opinions had been filed with the Court

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(... continued)

<sup>63</sup> When he answered the Rogels' interrogatories about "the damages you claim... under the RCW 25.15 dissenters' rights statute," Humphrey unequivocally responded he was not seeking damages from them: "The judicial appraisal will determine the fair value of Humphrey's interest... the judgment will be for the fair value of HI's interest, not for damages." CP 1999:15-23. The answer continued, "At the time this suit was filed, Clay Street was an administratively dissolved company which had liquidated and distributed substantially all of its assets to the non-dissenting members. The members who received the liquidation distributions hold the funds in trust subject to creditor claims such as HI." CP 2000:1-4 (emphasis in original). To recover the distribution, RCW 25.15.235(3) required the members to be named as defendants in lawsuit. See also CP 255 (discussing winding up, equitable and statutory remedies).

<sup>64</sup> In re West Waterway Lumber Co., 59 Wn.2d 310, 367 P.2d 807 (1962) (reversing and remanding where the trial court accorded weight only to the current liquidation value of the shares and dismissed other factors of considerable importance); Petition of Northwest Greyhound Lines, Inc., 41 Wn.2d 672, 251 P.2d 607 (1952) (ruling the evidence preponderated against the trial court's findings and showed a lower share price).

<sup>65</sup> Resp. to Clay Str. Brief Re: Fair Value, June 16, 2007 citing authorities and (continued...)

**BRIEF OF RESPONDENT  
WHERE ROGELS ARGUED FOR AFFIRMING OF  
AN AWARD IN THEIR FAVOR**

interests, based on the appraisal of the property by Mr. Barnes at 3.15 million dollars; is that correct?

A. That's correct.

RP 293. Clearly, there was no misconduct in later introducing additional testimony about the increased payment offer; if there was, Humphrey waived any objection to it by failing to timely object. ER 103(a)(1).

In October 2006, after the undersigned took over as counsel for Clay I, Clay I reiterated its earlier proposal by making the CR 68 offer described above. Clay I's offer of judgment was never presented or mentioned at trial; the first time it was filed with the court was in connection with the attorney fee motions. CP 3160-65, 3308-09; see CP 3433-50. Put simply, there is no more factual basis for Humphrey's claim that Clay I somehow committed misconduct by putting "settlement" offers before the trier of fact than there is for any of his other allegations.

**2. The court had ample reason to award fees and expenses to the Rogels**

As with Clay I, Humphrey failed to challenge the findings that support the trial court's fee award to Joseph and Ann Lee Rogel. The Rogels are a retired couple who were "passive investors" in Clay I. CP 2329 (A-II at 10, FOF 3).

The trial court's findings and conclusions of Humphrey's vexatious litigation against Clay I were applied by the trial court with equal weight to the Rogels. CP 2329, 2331 (A-II at 10, 12, FOF 1-2, COL

1). As with Clay I, Humphrey similarly failed to establish that the trial

court's findings and conclusions to award fees to the Rogels were an abuse of discretion.

By way of background, Humphrey held particular animus towards this elderly couple. This background animus is described at pages 4-7 of the trial court's fee award. CP 2323-26, 2328 (A-II at 4-7, 9 (COL 1)). As the trial court noted, the Rogels were embroiled in prior arbitrations against Humphrey concerning a co-investment named 899 West Main, LLC. Retired King County Superior Court Judge David Soukup acted as the arbitrator. Arbitrator Soukup found that Humphrey breached fiduciary duties and created a situation in which that LLC had to be wound up. CP 2323 (A-II at 4).

Humphrey then named the Rogels as defendants in this case, purportedly because of their alleged unlawful involvement in a co-investment named 615 Commerce Street (CP 21) and their alleged unlawful involvement with the sale of the Clay I property. CP 21-24. Humphrey sought a judgment against Joe Rogel in his complaint. CP 26.

The Rogels had been embroiled in another prior case with Humphrey concerning 615 Commerce Street. There, King County Superior Court Judge Lum dismissed Humphrey's action with prejudice in the Spring 2005. Humphrey then revived the "615" cause of action against the Rogels *in the present case* where it was then *dismissed a second time with prejudice* by the trial court in October 2005. CP 2525, 2530 (A-II at 6, 11, FOF 6-8).

The trial court in this matter ordered that the statutory dissenters' rights action that is the subject of this appeal be heard by the court and bifurcated the remaining issues for resolution by binding arbitration. CP 342-45. However, Humphrey refused to dismiss the Rogels from the dissenters' rights action despite their demands in September and October 2006. Supp. CP (Dkt. No. 287). Although presented with the opportunity to dismiss them, Humphrey's refusal required the Rogels to defend a case that really did not involve them and thus they were required to prepare for and participate in trial. CP 3369-89; Supp. CP (Dkt. No. 287); CP 2325-26 (A-II at at 6-7), CP 2329 (A-II at 10, FOF 3-5).

Nothing within RCW 25.15.475, the statute governing the initiation of and naming of parties to a dissenters' rights action, grants a dissenter a right of action against a passive-investor member of an LLC. The dissenters' right of action is statutory and supplants the common law. *Matthew G. Norton v. Smyth*, 112 Wn. App. 865, 873, 51 P.3d 159 (2002). Therefore, Humphrey had no right to maintain a dissenters' rights action against any member of Clay I.

Humphrey now contends that the naming of the Rogels was proper in the dissenters' rights action because Clay I was dissolved and distributions had been made to its members, including the Rogels (and Humphrey, too). Thus, Humphrey argues, there is some intuitive right to preemptively name the Rogels as defendants prior to Humphrey suffering any loss. Humphrey has and had it vexatiously backwards. Facts, not wishful thinking, are what give rise to a claim against a culpable

defendant. Our system of law does not allow Humphrey to choose persons as defendants (the Rogels) to satisfy a claim lacking facts (that Clay I cannot pay a judgment), particularly where the underlying claim (dissenters' rights) is solely against another person, here Clay I.

In sum, the trial court did not abuse its discretion with its findings and conclusions that Humphrey vexed thrice: naming the Rogels as defendants in the dissenters' rights action, refusing to dismiss them, and then engaging in the vexatious litigation described in the Clay I section, above.

**D. Substantial Evidence Supports the Trial Court's Fair Value Determination**

Humphrey's final arguments pertain to the trial court's fair value determination. The court made that determination based on some 200 exhibits, and testimony presented at a one-week trial. As explained in Sec. III, *supra*, after trial the court made detailed findings of fact to which Humphrey fails to effectively assign error and which are amply supported by the evidence. Not surprisingly, given the substantial evidentiary support for the trial court's findings, that part of Humphrey's brief devoted to the valuation (App. Br. at 39-49) argues not that the evidence does not support the court's findings, but that the court erred by relying on evidence and analyses other than Humphrey's. Such arguments establish no basis for reversal, particularly given the rule that when findings are based on conflicting testimony, this Court's substantial evidence analysis is limited to determining whether evidence favorable to the prevailing

**HUMPHREY'S REPLY BRIEF  
ON THE FEE AWARD TO THE ROGELS**

82687-1

No. 60923-8-1

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

HUMPHREY INDUSTRIES, LTD.,

Plaintiffs-Appellant

v.

CLAY STREET ASSOCIATES LLC, et al.,

Defendant-Respondents

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2008 AUG 11 PM 2:03

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Harry McCarthy)

APPELLANT'S REVISED REPLY BRIEF

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ORIGINAL

turned the statutory protections inside out when it awarded fees and costs to Clay Street and the Rogels.

**C. The trial court committed an error of law when it granted the Rogels fees pursuant to RCW 25.15.490(2)(b).**

The fee award rests on the finding (CP 2381:22-28, FOF 5) that Humphrey refused to dismiss the Rogels as parties to the lawsuit and the ruling that "Humphrey had no claim" against them. CP 2378:3-6.<sup>44</sup> The finding is contradicted by pleadings and discovery responses that the direct claims against the Rogels "for the funds in trust subject to creditor

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( . . . continued)

Clay Street's opening statement (RP 39:13-40 ADD) and other trial objections, a specific brief during trial (Dkt. #262, June 15, 2007 (No CP yet), and in post-trial pleadings. See App. C. Even if there were a waiver of the evidentiary rule, Humphrey did not waive the statutory terms. Next, Clay Street asserts the offer of judgment was not mentioned at trial and was filed with its fee application. Br. of Resp. at 41. In similar circumstances, RCW 4.84.280 requires an offer of judgment "shall not be filed or communicated to the trier of fact until after judgment" and this court has affirmed the forfeiture of fees for the violation of this requirement. Hansen v. Estell, 100 Wn. App. 281, 290-91, 997 P.3d 426 (2000). Furthermore, starting with the opening statement (RP 36:9-15, 39:14-40:5, 40:9-22), Clay Street interjected the settlement offer that it later argued was related to the offer of judgment. In responding to briefing concerning postponing the fee application until after the motion to alter the court's oral ruling on fair value, Clay Street also emphasized the settlement offer/offer of judgment: "Finally, as set forth in defendants' motions for fees, this case could have and should have been resolved long ago given defendants' offer to pay plaintiff far more than . . . plaintiff recovered at trial." Clay Street Defs.' Resp. to Plf's Motion to Continue Plf's Motion to Continue Defs. Motions for Fees and Costs at 1:20-23 (July 12, 2007) (Supp CP.) By impermissibly rewriting CR 68 to shift fees, Clay Street deprived Humphrey of having a separate cost hearing.

<sup>44</sup> The Rogels' "vexation" argument was Humphrey could not "chase persons as defendants (the Rogels) to satisfy a claim lacking facts (that Clay I cannot pay a judgment), where the underlying claim (dissenters' rights) is solely against another person, here Clay I." Br. of Resp. at 44 (without citing any authority); CP3431:14-3432:6 (same). The last assertion in the argument is irrelevant but correct. The appraisal claim was "solely against" the company and was tried to the court, twenty months after Judge Hayden granted the motion compelling arbitration of the "breaches of fiduciary duty claims against Clay I and the other members [the Rogels]." CP 1997:11-14; CP 342-45 (order); CP 3391:21-24 (admitting non-appraisal claims were reserved for arbitration).

claims" were stayed pending arbitration so the claims were not part of the "judicial appraisal." App.'s Revised Opening Br. at 38-39 & nn.62-63. Furthermore, the ruling that Humphrey "had no claim" against them is a clear error of law, because the stayed direct claims were well supported by the LLC statute and the common law concerning preferential distributions by a dissolved company.<sup>45</sup> There was also documentary evidence that additional funds were owed (the appraisal of Clay Street's own expert) and of insolvency.<sup>46</sup> In summary, the trial court committed an error of law

<sup>45</sup> By operation of RCW 25.15.230, Humphrey was a "creditor" once he was entitled to a "distribution" in the form of the "fair value" payment, and creditor status vested when "the merger becomes effective" pursuant to RCW 25.15.450, and at which time he lost all rights in the company. Thirty days later the payment became due by operation of RCW 25.15.460, but the company failed to make the payment. During the winding up of the dissolved company, RCW 25.15.300(1)(a) required creditors, like Humphrey, to be paid first. *Noble v. A&R Envtl Serv. LLC*, 140 Wn. App. 29, 36 (2007) (assets to be distributed first to creditors). In addition, the company violated RCW 25.15.235(1) (limiting distributions to the members) and a statutory/constructive trust that attached to the past due funds owed to Humphrey, when the other members were paid first and without making a "fair value" calculation. This action resulted in the individual members (owners) having liability under RCW 25.15.235(2), and triggered RCW 25.15.235(3)'s deadline to sue the other members. RCW 25.15.235(2) imposes statutory liability on the members, while its "other applicable law" provision reserves common law claims against the members for constructive trust, breach of fiduciary duty, and piercing the corporate veil (RCW 25.15.060). See CP 70:16-26 (constructive trust claim against members receiving distributions); CP 255:1-12 & nn.8-9 (summarizing statutory and common law claims); CP 13-20 & nn.14-15 (responding to similar argument by Rogels); CP 329:1-11 & nn.6-8 (asserting insolvent company's assets are a trust fund and possible fraudulent transfers); CP336:20-337:1 & n.17 (link for company's expired license); CP 1996:21-1997 (opposing fee claim and arguing RCW 25.15.300 which refers to RCW 25.15.215 and .230), CP 1999:16-2001:20 (opposing Rogel's fee claim and expanding on the arguments). Humphrey can pursue direct claims against the other members "if his alleged entitlement to them arises from something other than his shareholder [member] status," -- here the status is a creditor. *Sound Infniti, Inc.*, Wn. App. ¶¶ 38-39, 186 P.3d 1107.

<sup>46</sup> CP 241:21-24 & n.1 (company admitting "nearly all proceeds were dissipated" and "[a] relatively small sum . . . is being held"); CP 261 (handwritten provision in order requiring notice prior to disbursement).

when it ruled Humphrey had no statutory or common law claim against the Rogels.

**D. The fair value determination rests on untenable grounds<sup>47</sup> resulting from Clay Street's manipulation of the appraisal process.**

Clay Street's brief does not contest the material facts that are the basis for challenging the fair value determination.<sup>48</sup> What remains are either errors of law or untenable bases. The decision is based on an incorrect standard because it violates "management's fiduciary responsibilities" to pay "the highest price that a third party was actually

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<sup>47</sup> "A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary." Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 683, 15 P.3d 115 (2000). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). A court's decision is based on untenable grounds "if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Id.

<sup>48</sup> App.'s Revised Opening Br. at 41-42 & App. B Assignments of Error to Findings of Fact and Conclusions of Law at 9:19-10:15, 11:12-12:5, 12:23-22:57, 13:9-10, 17, 14:6-17, 14:25-15:11, 16:6-20, 17:11-18; 19:16-20:16, 21:7-22:5, 22:15-23:3, 25:16-23. These facts include that Clay Street had provided its own appraiser misinformation about the marketing and square feet of office space in the warehouses. "It was sold subsequent to the appraisal date closing in May 2005 at price of \$3,300,000. ... The property was marketed for sale beginning in December 2004 with an asking price of \$3,350,000. It [was] placed under contract in March, 2005." Ex. 257 (Appraisal, Intro, at 1); RP at 576:13-21 (Barnes testifying information provided by Cowan and Scott Rogel). In fact, it was pre-marketed starting in October before it could be sold, and it was placed under a letter of intent in December, and the same buyer signed a contract for the same price in February. See also Ex. 257 at Summary of Salient Facts (appraisal showing 11% office space, 1998 year built); Ex. 257 at 55-61, 72-73 (failing to mention actual sale in sales comparison and reconciliation and final opinion value). Clay Street does not contest the fact that its appraiser never considered the additional office space or the comparables identified by the court-appointed appraisers or Humphrey, and that at trial its appraiser disclosed a new opinion that he had placed considerable weight on the "post-merger" sale to reduce his opinion from \$3.35 to \$3.15 million. Compare Ex. 257 (appraisal using \$3.15) with Ex. 133 (draft report showing \$3.35); RP at 557:6-15, 586:8-588:8 (Test. by appraiser explaining reduction was based on the sales price).



## **RESPONDENTS' SUPPLEMENTAL BRIEF**

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No. 826871

SUPREME COURT  
OF THE STATE OF WASHINGTON

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HUMPHREY INDUSTRIES, LTD.,

Appellants,

v.

CLAY STREET ASSOCIATES, LLC, et al.,

Respondents.

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RESPONDENTS' SUPPLEMENTAL BRIEF

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### V. RESPONDENTS' REQUEST FOR FEES

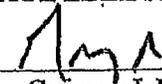
The Court of Appeals awarded respondents their reasonable attorney fees and expenses on appeal under RCW 25.15.480(2)(b) and RAP 18.1. Op. at 16. Pursuant to the same authority, respondents request an award of the additional attorney fees and expenses they have incurred in the Supreme Court.

### VI. CONCLUSION

It is time to end Humphrey's campaign against respondents. The evidence fully supports the Court of Appeals' affirmance of the trial court and the relevant law belies Humphrey's arguments. For these reasons, and for all the additional reasons stated above and in their other briefs on file with the Court, respondents respectfully ask this Court to affirm the Court of Appeals and to award them their reasonable fees and expenses.

DATED this 7<sup>th</sup> day of August, 2009.

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**MOTION FOR RECONSIDERATION  
BY INDIVIDUAL MEMBERS**

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No. 826871

SUPREME COURT  
OF THE STATE OF WASHINGTON

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HUMPHREY INDUSTRIES, LTD.,

Appellants,

v.

CLAY STREET ASSOCIATES, LLC, et al.,

Respondents.

---

RESPONDENTS' MOTION FOR RECONSIDERATION AND  
CLARIFICATION

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& Ann Lee Rogel

## I. PARTY SEEKING RELIEF

Defendants below and respondents herein, Clay Street Associates, LLC ("Clay Street"), Scott Rogel, ABO Investments, LLC, and Joseph and Ann Lee Rogel, are the moving parties. At times herein, Scott Rogel, ABO Investments, LLC, and Joseph and Ann Lee Rogel are collectively referred to as the "individual members;" Joseph and Ann Lee Rogel are at times collectively referred to as "the Rogels."

## II. RELIEF SOUGHT

Clay Street and the individual members jointly move the Court to reconsider that part of the decision filed on November 10, 2010, which states: "[a]s the prevailing party, Humphrey is entitled to attorney fees for this appeal." Majority Op. at 19 (a copy is attached). That award is premature since Humphrey Industries, Ltd.'s ("Humphrey's") right to recover fees for any stage of this matter must await the trial court's discretionary determination of Humphrey's right to fees under RCW 25.15.480(2)(a). It is also unwarranted as to the individual members since they are not statutorily-defined parties against whom Humphrey may obtain attorney fees.

Clay Street additionally asks the Court to clarify that, on remand, in addition to deciding whether Humphrey is entitled to a fee award under RCW 25.15.480(2)(a), the trial court may also consider whether Clay Street may recover its fees under RCW 25.15.480(2)(b) given that Clay

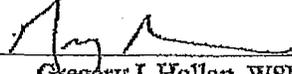
settlement negotiations," or "prelitigation conduct or conduct in other suits [among the parties]." Majority Op. at 17. For the reasons stated *infra*, that holding conflicts with decisions from other jurisdictions, renders RCW 25.15.480(2)(b) virtually meaningless, and thus warrants reconsideration. But whether or not the Court agrees to reconsider that issue, the record establishes that Humphrey doggedly persisted in adhering to a baseless and grossly inflated buyout figure that the trial court found "to be well outside the mainstream of reasonably based valuations," that "[did] not have substantial or credible evidence to support it," and that was "without support." CP 2314-16 (FOFs 39, 40, 44). Those findings remain intact to this day. As discussed further below, such conduct can, by itself, justify a fee award under RCW 25.15.480(2)(b). Consequently the Court should clarify that on remand, the trial court has discretion to decide whether -- based on appropriate evidence -- Clay Street still can move to recover its fees under that statutory provision.

By way of further clarification, the individual members wish to establish that Humphrey is not entitled to an award of fees against them personally. The Rogels additionally seek to establish that unchallenged fee-award findings as to Humphrey's litigation conduct towards the Rogels, in conjunction with the appropriately considered evidence described above, provide the trial court grounds for exercising its

that Clay Street and the Rogels each retain the right to, on remand, seek fees under RCW 25.15.480(2)(b), and further request that the Court provide additional guidance as to what evidence a trial court can properly consider in connection with a fee request made under the statute. Finally, the individual members ask this Court for clarification that Humphrey may not seek attorneys' fees against them, given the lack of statutory authority for any such award.

DATED this 30<sup>th</sup> day of November, 2010.

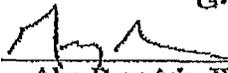
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*G. Hollon for A. Hornstein*

*per telephone conference WSBA 26311*

**PLEADINGS SHOWING HUMPHREY HAD  
ADOPTED APPROAISERS' VALUES AND  
HUMPHREY'S TESTIMONY ON PRE-  
LITIGATION DEMAND AMOUNT WAS TO  
SHOW GOOD FAITH**

**Attachment D**

**SEPTEMBER 2006 MOTION TO ADOPT  
APPRAISAL REPORT**

FILED

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KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

Honorable Michael Hayden  
Thursday, September 21, 2006  
W/O Oral Argument

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

HUMPHREY INDUSTRIES, LTD.,  
  
Plaintiffs,  
  
v.  
  
CLAY STREET ASSOCIATES LLC; 615  
COMMERCE; CLAY ASSOCIATES  
PHASE II LLC; SCOTT ROGEL, LORI  
GOLDFARB; JOSEPH ROGEL and LEE  
ANN ROGEL, husband and wife; ABO  
INVESTMENTS; AND AVRAM  
INVESTMENTS,  
  
Defendants.

No. 05-2-20201-7 SEA

MOTION TO ADOPT THE REPORT OF  
THE COURT-APPOINTED APPRAISER

NOTED FOR SEPTEMBER 21, 2006  
WITHOUT ORAL ARGUMENT

1. Relief Sought. In this dissenter's rights action against Clay Street Associates L.L.C. ("Clay Street"), plaintiff Humphrey Industries ("HI") asks the Court to adopt the report of the court-appointed appraiser as the fair value of the company. The appraiser recently set the fair market value at \$3.63 million which is over a million dollars higher than the so-called fair value payment delivered by Clay Street. See Attachs. A and B.

2. Statement of Facts. Clay Street's control group conducted a squeeze-out merger to forfeit HI's contractual right to block the sale of the company's sole asset, real property. The merger became effective on December 7, 2004. Clay Street failed to make a timely fair value payment to HI in January 2005, 30 days after the effective date of the merger.

MOTION TO ADOPT APPRAISER'S REPORT - 1

120144.0004/1324660.1

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1 In May 2005, Clay Street closed the sale of the property for \$3.3 million. Later that  
2 month, Clay Street made HI a fair value payment based upon a materially lower \$2.5 million  
3 value for the company. HI contested the low and delinquent fair value payment.

4 On June 21, 2005, HI filed this suit requesting the Court appoint an appraiser and for  
5 other relief. Complaint ¶ 20.

6 Last July, Clay Street made a contribution call to its partners, because it did not have  
7 the funds to pay HI. On July 29, Clay Street filed a separate lawsuit for the determination of  
8 fair value. Clay Street Associates, LLC v. Humphrey Industries, Case No. 05-2-24967-6  
9 SEA; G. Humphrey Decl. at 17:1-5. In April 2006, Clay Street filed a motion to consolidate  
10 the other suit with this suit.

11 The Court has already ruled Clay Street violated the timely payment requirement of  
12 the dissenter's rights statute. On October 7, 2005, the Court decided the motions for partial  
13 summary judgment, a stay, and the appointment of receiver.<sup>1</sup> The Court denied Clay Street's  
14 motion seeking arbitration of the dissenter's rights claims. Order Granting Motion to Stay  
15 Arbitration of Appraisal Rights and Granting Motion to Compel Arbitration on Other Claims  
16 Relating to Clay Street (Oct. 7, 2006). The Court ruled an appraiser should be appointed.  
17 The Court granted in part and denied in part HI's motion for summary judgment on the  
18 dissenter's rights claims. The Court found Clay Street "violated RCW 25.15.460(1) in that  
19 payment was not timely made." The statute required payment in January 2005, 30 days after  
20 the effective date of the merger, but payment was not made until May 2005. The Court

21 <sup>1</sup> Clay Street failed to comply with the Court's order. Earlier in September 2005, Clay Street  
22 was "directed to produce documents that are requested under RCW 25.15.135 within 7  
23 business days of receipt of the list from plaintiff's counsel." (Sept. 13, 2005 order.) HI  
24 requested the inspection of all the company records that were covered by the statute. Yet,  
25 Clay Street produced only a single year-end financial statement and claimed no other financial  
26 statements existed. Reply in Supp. of Prelim. Inj. and Other Relief at 5:1-7 (Sept. 22, 2005)  
(Clay Street sent one financial statement and initially refused to identify the amount of funds  
being held in attorney's trust account) Sept. 21, 2005 letter from Holmes to Spellman, Ex. to  
A. Humphreys Decl; Decl. in Resp. to CR 11 Motion and Cross-Motion for Reconsideration  
at 4:4-34 (Oct. 17, 2005)

MOTION TO ADOPT APPRAISER'S REPORT - 2

120144.0004/1324660.1

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**APRIL 2007  
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

HUMPHREY INDUSTRIES, LTD.,

Plaintiff,

v.

CLAY STREET ASSOCIATES LLC; et al.

Defendants.

NO. 05-2-20201-7 SEA

(Consolidated With  
05-2-24967-6 SEA)

HUMPHREY'S TRIAL BRIEF

CLAY STREET ASSOCIATES LLC, a  
limited liability company,

Plaintiff,

v.

HUMPHREY INDUSTRIES, LTD., a  
Washington corporation,

Defendant.

HUMPHREY'S TRIAL BRIEF - 1

120144.0004/1379685.1

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1 Clay Street sent Humphrey the merger documents and later a request for  
2 additional funds.

3 Clay Street was listed for sale at \$3.3 million in September 2004.

4 Clay Street failed to act on Humphrey's statutory demand for payment as a  
5 dissenter and the demands for arbitration.

6 On December 8, 2004, one day after the effective date of the merger, Clay  
7 Street signed a letter of intent to sell the property for \$3.3 million.

8 In late December 2004, Scott Rogel sent Lori Goldfarb and her lawyer an  
9 email with a pro forma and the purchase and sale agreement with instructions not to  
10 disclose the information to Humphrey.

11 After learning about the closing of the sale in May 2005, Humphrey demanded  
12 company documents and sought to join a dissenters' rights claim against Clay Street in  
13 the suit against 901 Tacoma.

14 Clay Street's \$2.5 million "fair value" calculation was substantially lower than  
15 purchase offers rejected by Clay Street and the amount paid to other members of Clay  
16 Street.

17 Clay Street's own pro formas and deposition testimony demonstrate the "fair  
18 value" calculation was made in bad faith and Clay Street committed intentional  
19 violations of the statute.

20 After receiving the lowball and tardy payment, Humphrey filed this suit for the  
21 judicial appraisal of "fair value."

22 Judge Hayden previously ruled Clay Street violated the statute and asked for  
23 additional briefing about other violations.

24 The final appraisal report sets values that are also substantially greater than  
25 Clay Street's "fair value" calculation.

26 V. Legal Argument.

1. The remedial purpose of the appraisal statute is to protect dissenters.

2. The dissenters' rights statute authorizes the appointment of an appraiser, and  
the company agreement memorialized the members' prior consent to a determination  
by a mutually agreed upon appraiser.

3. "Fair value" should be construed consistent with FASEB Statement 157 Fair  
Value Measurements which imposes rules and has a hierarchy of values.

HUMPHREY'S TRIAL BRIEF - 3

120144.0004/1379685.1

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II.

Summary of Issues.

There are five issues for the Court to decide either at trial or at a later hearing:

- A. What is the "fair value" of Clay Street?
- B. Does a bank loan interest rate or a "fair and just" interest rate apply from the effective date of the merger until payment?
- C. Does the statutory presumption that the company bears the costs of the suit apply?
- D. Does this case satisfy the statutory requirements for the award of fees and expenses?
- E. Does the Court want to consider evidence and rulings in other partnership disputes that are outside the scope of this appraisal suit?

The evidence will demonstrate that the Court should decide all issues in favor of Humphrey.

A. The trial on "fair value" should be limited to relevant, admissible evidence that was properly disclosed during discovery. Judge Hayden has already appointed appraisers to set the "fair value," and the Court should adopt one of the measures in those reports. Once the first appraiser's reports were completed, Clay Street objected that the values were too high and requested the appraiser perform additional work and create a supplemental report. After health issues prevented the first appraiser from completing the supplemental report, Judge Hayden appointed the appraiser's partner to complete the supplemental report. The supplemental report has been completed.

Humphrey anticipates that Clay Street will object to the higher values of \$3,520,000 to \$3,885,000 in the new report and complain it is a windfall. Clay Street, however, assumed the risk of a quick sale in a rising market, ignored its statutory obligations, and then failed to reduce its loss by making an additional payment to Humphrey or depositing funds with the Court.



1 "fair value" should be restricted to relevant, admissible evidence that was properly disclosed  
2 during discovery.

3 B. Prejudgment Interest. Humphrey should be granted prejudgment interest as a  
4 "make-whole remedy" for the other members' retention of funds during the past twenty-three  
5 months. The contractual interest rate of 15% for loans to the company should accrue on any  
6 amounts due after May 2005, when the company extinguished the primary bank loan and  
7 liquidated and disbursed nearly all the company's assets to the other members. Ex. 30,  
8 Company Agreement for WXYZ LLC at 4 (contractual rate).

9 The contractual rate is fair and equitable given the protracted appraisal process.  
10 During the eighteen month process, Humphrey caused at most a three week delay while it  
11 attempted to correct typographical errors that Clay Street's counsel had earlier acknowledged  
12 in the joint instructions to the first appraiser. Dkt. # 172 at 1-5. The parties were warned that  
13 the first appraiser's report could be delayed by five months due to his preexisting schedule  
14 (completing valuations and testimony relating to condemnations). Id. The appraisal process  
15 was extended further, when Clay Street's new counsel requested the first appraiser make a  
16 supplemental report and later when the appraiser's health deteriorated.

17 C. Costs. The company should bear the costs of the suit, because it failed to  
18 substantially comply with the requirements of the statute. Judge Hayden has ruled that the  
19 company violated the timely payment requirement, Dkt. # 91, and he requested additional  
20 briefing from the company about the compliance with the other statutory requirements,  
21 because the company failed to address the other asserted violations at the hearing. Clay Street  
22 failed to provide the additional briefing. Exs. 105-16. Further, Clay Street's failure to follow  
23 the statutory requirements was not accidental. During discovery, Clay Street produced an  
24 internal pre-merger company document, "LLC Merger Procedure" (Ex. 28), that demonstrates  
25 the company had actual notice of the statutory requirements; nevertheless, the company went  
26

HUMPHREY'S TRIAL BRIEF - 9

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1 their lawyers (who represented them in the 901 Tacoma suit) not to accept service of process  
2 of the complaint, which had been delivered to them. Ex. 79; letters; Ex. 98, Amended Decl. at  
3 16:14-18.

4 Judge Hayden previously ruled Clay Street violated the statute and asked for  
5 additional briefing about other violations. Dkt. # 91, Oct. 7, 2005, Order Granting Motion to  
6 Stay Arbitration of Appraisal Rights and Granting Motion to Compel Arbitration on Other  
7 Claims Relating to Clay Street; Ex. 105, Oct. 14, 2005 letter at 1; Ex. 106, Oct. 31, 2005  
8 letter.

9 The final appraisal report sets values that are also substantially greater than Clay  
10 Street's "fair value" calculation. Almost two years later, the second appraiser appointed by  
11 the Court, Darin Shedd, produced his report.<sup>5</sup> The complete reports offered are:

	December 7, 2004	May 16, 2005
13 Allen/Shedd		
14 Appointed by the Court		
15 Fee Simple	\$3,655,000	\$3,885,000
16 Leased Fee	\$3,520,000	\$3,800,000
17 Clay Street's		
18 Cushman/Wakefield		
19 Stabilized market of		
20 Leased fee	\$3,300,000	
21 As is of leased fee	\$3,150,000	

22 Clay Street's "fair value" calculation was \$2,533,000—which was \$617,000 below the lowest  
23 value listed above and over a million below the higher values. Humphrey's interest is roughly  
24 25% of the amount in excess of \$2,533,000.

25 V.

26 Legal Argument.

<sup>5</sup> In April 2005, Clay Street filed a motion for sanctions against Humphrey for allegedly interfering with the appraiser's work. Dkt. # 122. The dispute arose from the omission of several agreed items in joint letter/instructions to the appraiser, including, giving the appraiser the original 1998 appraisal of the property. Dkt. # 127, Spellman Decl. at 1-5, May 3, 2006. Clay Street's original counsel acknowledged the omission in a contemporaneous email. Id.

HUMPHREY'S TRIAL BRIEF - 30

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1           5.     The statutory presumption that Clay Street bears the costs of this suit  
2 applies, because there is no evidence that Humphrey acted arbitrarily or vexatiously or  
3 not in good faith in demanding payment. RCW 25.15.480, "Unsettled demand for  
4 payment—Costs—Fees and expenses of counsel," states:

5           (1) The court in a proceeding commenced under RCW 25.15.475 shall  
6 determine all costs of the proceeding, including the reasonable compensation  
7 and expenses of appraisers appointed by the court. The court shall assess the  
8 costs against the limited liability company, except that the court may assess the  
9 costs against all or some of the dissenters, in amounts the court finds  
10 equitable, to the extent the court finds the dissenters acted arbitrarily,  
11 vexatiously, or not in good faith in demanding payment.

12           A few other states require a period of settlement negotiations before a  
13 shareholder can pursue an appraisal claim, and some states require the dissenter to  
14 make an estimate of "fair value" during the period.<sup>15</sup> But the model corporate act and  
15 the Washington statutes omit any requirement that settlement negotiations precede the  
16 filing of the suit.<sup>16</sup> The model act and the Washington statutes adopt another policy--  
17 the company must make the mandatory prepayment of "fair value," and "no attempt to  
18 specify or negotiate "fair value" is required of the" dissenter—a probable policy  
19 reason being "the shareholder often lacks the information, at this early stage, to make  
20 a reliable determination" of fair value.<sup>17</sup> In addition to ensuring that the dissenter is  
21 timely paid, the prepayment policy recognizes there is a disparity in access to  
22 company information. "A shareholder has the right to financial information in order  
23 to value his or her interest. . . . The amount of information necessary to value the  
24 shares of stock is to be determined by facts about the corporation itself. . . ."<sup>18</sup>  
25 Clay Street failed to voluntarily supply this kind of information. Ex.77. Eventually,  
26 the Court ordered Clay Street to produce the records that were subject to inspection  
pursuant to Humphrey's statutory rights as a member. Dkt. #70. Humphrey has

15 2 ALI Principles of Corporate Governance § 7.23 cmt. c at 340 (1994).

16 See motion to strike (BR 408 motion).

17 Principles § 7.23, cmt. c at 340, cmt. e at 342.

18 12B William Meade Fletcher, Fletcher Encyclopedia of the Law of Private Corps. § 5906.120  
at 396-97 (2000).

HUMPHREY'S TRIAL BRIEF - 38

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1 already submitted to the Court Clay Street's failure to comply with the order. Dkt. #  
2 107 at 4:4-34, Oct. 18, 2005. The company is making the process as expensive as  
3 possible by dribbling out information, failing to answer discovery and making last  
4 minute production of records.

5 Clay Street failed to file suit until July 2005--six months after the statutory  
6 deadline. A leading treatise on corporate law states:

7 In some states the statute gives the corporation the primary right to  
8 initiate the appraisal proceeding. One court has interpreted such a statute as  
9 casting the corporation in the role of a civil plaintiff; thus, the corporation was  
10 held to have the burden of proving the value of the dissenting shareholders'  
11 shares. The purpose of having the corporation initiate the actions is said to be  
12 in the interests of judicial economy, thus preventing multiple shareholder  
13 actions. If the corporation fails to initiate the proceeding, a dissenting  
14 shareholder can bring the action, upon which he or she is entitled to the joinder  
15 of all other dissenting shareholders.<sup>19</sup>

16 Consistent with the remedial purpose of the statute, Humphrey had every right to file  
17 suit—especially since the company ignored the earlier demands for arbitration. Four  
18 months ago, after Clay Street contended that it was the proper plaintiff in this  
19 consolidated suit, Judge Hayden ruled that Humphrey was the proper plaintiff. Dkt.  
20 #204, motion; Dkt. #206, order. That order is dispositive of Clay Street's claim that  
21 Humphrey was vexatious.

22 Humphrey also acted in "good faith in demanding payment." Humphrey made  
23 a demand for payment (using the company's own form). Humphrey's second demand  
24 was for \$4.1 million substantially closer to Clay Street's prior valuations (\$3.6  
25 million) than Clay Street's "fair value" calculation of \$2.5 million. Humphrey's  
26 demand which equals approximately \$85/sq. ft was lower than a similar project  
Humphrey then was working on with an appraised value of \$100/sq.ft. Ex. 122, Third  
Street appraisal; see also Decl. In Supp. of Reply Brief Re Mot. for Partial Summ. J.  
on the Issues Relating to Clay Street and Stay of Other Actions at 3-4 (Oct. 3, 2005).

<sup>19</sup> 15 Victoria A Braucher, et al, Fletcher Cyclopedia of the Law of Private Corporations §  
7165.20 at 436 (1999) (emphasis added; but citing Weiss v. Summit Org., Inc., 80 A.D.2d  
526, 436 N.Y.S.2d 6 (1981) (however, the statute in that case expressly granted shareholders  
the right to file such an action) ).

HUMPHREY'S TRIAL BRIEF - 39

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1 Humphrey also provided sales comps from October 2004 through August 2005 whose  
2 average square foot value was \$86/sq.ft.—the almost the amount of Humphrey's  
3 demand. Ex. 94, Attach. B, Kent Valley Industrial Comps. Humphrey also identified  
4 another project, Park 280, which was a mirror image of Clay Street and was built by  
5 the same contractor and sold in October 2004—two months before the merger for  
6 \$91.69/sqft. Ex. 113, Shedd's appraisal at 35 (Item 3, 4710 B Str. NW). Humphrey's  
7 demand equals the gross price that the second appraiser used for the gross revenue  
8 from the condominiumization of the property. Humphrey, furthermore, stipulated to the  
9 adoption of the appraiser's first report, while Clay Street opposed the adoption of the  
report and caused additional fees and cost and delay.

10 6. Fees and expenses are awarded against Clay Street, because it  
11 materially violated the statute and acted arbitrarily, vexatiously, and in bad faith. The  
12 dissenters' rights statute has two alternative tests for the award of fees/expenses  
against the company. RCW 25.15.480(2) states:

13  
14 (2) The court may also assess the fees and expenses of counsel and experts for  
the respective parties, in amounts the court finds equitable:

15 (a) Against the limited liability company and in favor of any or all dissenters if  
16 the court finds the limited liability company did not substantially comply with  
the requirements of this article; or

17 (b) Against either the limited liability company or a dissenter, in favor of any  
18 other party, if the court finds that the party against whom the fees and expenses  
are assessed acted arbitrarily, vexatiously,<sup>20</sup> or not in good faith with respect to  
the rights provided by this article.

19 Under either test, Humphrey is entitled to an award of fees and expenses.

20 The statute's mandatory prepayment obligation is principally enforced through  
21 holding the company liable for reasonable attorney's fees, where the company fails to make

22 <sup>20</sup>Vexation" is defined as: "The injury or damage which is suffered in consequence of the  
23 tricks of another." Black's Law Dictionary at 1403 (5<sup>th</sup> Ed. 1979). Here the trickery was  
24 failure to disclose the prior valuations and using an inconsistent low valuation. Hensen v.  
25 Peter, 95 Wash. 628, 637, 164 P. 512 (1917) (noting that the equitable tolling rule is, among  
26 other things, "fortified by that sound public policy which sets its face against putting a  
premium upon unrighteous and vexatious litigation commenced and prosecuted by a party for  
the ulterior purpose of obtaining by indirection an advantage which in equity and good  
conscience he is not entitled to enjoy").

HUMPHREY'S TRIAL BRIEF - 40

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vexatiously, or not in good faith. There were no findings or conclusions in either proceeding, and thus no preclusionary effect. Finally, the misleading characterizations about those proceedings were refuted and the irrelevancy demonstrated. "[T]he mere fact that the shareholders took advantage of the statutory remedy and pursued that remedy with great vigor is not in and of itself evidence of bad faith." In re Realty & Utilities Corp., 29 Del. Ch. 480, 500, 52 A.2d 6 (1947).

4. The Trial Court Did Not Rule that Humphrey's Prelitigation Fair Value Estimate Was Arbitrary, Vexatious or Made In Bad Faith.

When Humphrey sent his fair value calculation, Humphrey had already filed a motion for global mediation that Clay Street opposed<sup>59</sup> and made requests for company records and information (Ex. 74), which were not provided with the payment delivered on May 27, 2005 (Ex. 75).

His calculation reasonably relied on the information that was then presently available<sup>60</sup> and was in response to Clay Street's lowball \$2.5 fair

<sup>59</sup> CP 1850 (Dec. 3, 2006 Ostroff Dep. Test. at 64:16-65:5).

<sup>60</sup> Humphrey relied on written appraisals that used higher values for the building next door, 899 West Main (CP 1692-1783, 1962), the Third Street appraisal (CP 247), a list of 23 comparables (provided by the leasing agent for Third Street) whose mathematical average was \$85.96/sq. CP 226-27, Ex. 113. Humphrey provided this and other information that the court-appointed appraiser considered and adopted in part. CP 987-83, Humphrey's Oct. 2005 declaration, memorialized that his \$85/sq. foot demand (\$4.1 million/48,352 sq. ft.) was lower than the construction costs for the Third Street project, lower than the appraisal for Third Street, lower than the appraisal for 899 West Main (CP 1692-1783) which is the property next door (CP 987-83), and lower than the buyout price for 899 West Main, as well as lower than the price of other buildings being sold for \$90 to \$130/sq. ft. The sales price and capitalization rates for some of  
(continued . . .)

value calculation that meant the property had not appreciated one cent in seven years. Humphrey did not have the rejected purchase offers. But he did have the \$3.4 to \$3.6 million figures that the co-managing members had used either during the prior years in financial statements provided to the bank or in emails sent to Humphrey. Exs. 10, 10A, 22. Finally, Humphrey had used the higher value for his federal taxes.<sup>61</sup> During trial, Clay Street offered no evidence challenging his good faith and the accuracy and legitimacy of the documentary evidence summarized above. Furthermore, in August 2006, ten months before trial, Humphrey stipulated to the values in the report by the first appraiser appointed by the court. Even though the trial court erroneously concluded Humphrey's figure was outside the mainstream of reasonably based valuations and did not have substantial or credible evidence to support it (Finding 40, CP 2314, CP 2324:14-16), there is no ruling that he acted arbitrarily, vexatiously or not in good faith in making the fair value calculation.

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(... continued)

those other buildings were listed in the June 2006 letter sent to Bruce Allen, the first appraiser appointed by the Court. Ex. 130. The pictures and financial data for the buildings were comparables in the appraiser's files. Ex. 125 (Park 280), Ex. 126 (Park 280 aerial versus) and Ex. 129 (Park 28, aerial, diagram, and property data showing \$79/sq. ft. (\$1,275,000/16,125 sq. ft.)). Humphrey identified Park 280, Clay Street's mirror image built by the same contractor as Clay Street and sold in October 2004—two months before the merger for \$91.69/sq. ft.—which Shedd, the second appraiser appointed by the Court, used as a comparable.

<sup>61</sup> CP 1815; Ex. 24; see also CP 987-83.

**PETITIONER'S REVISED  
SUPPLEMENTAL BRIEF**

No. 82687-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

HUMPHREY INDUSTRIES, LTD.,

Appellant

v.

CLAY STREET ASSOCIATES LLC, et al.,

Respondents

*PETITIONER'S*  
APPELLANT'S REVISED SUPPLEMENTAL BRIEF

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The company's settlement offer was made while the company was refusing to produce records, to which Humphrey was entitled as a member (*see supra* n. 35) and that were necessary to evaluate the settlement offer, which was later retracted, while the lowball value was reaffirmed. Humphrey's demand was lower than two items of unchallenged data that he had secured<sup>46</sup> and was consistent with Scott Rogel's valuation made two years earlier.<sup>47</sup> Humphrey's good faith is demonstrated by his stipulation to the court-appointed appraisers' lower value nine months before trial,<sup>48</sup> and he reaffirmed this reasonable position in his trial brief.<sup>49</sup>

As to the Court of Appeals' second and third categories of vexatious behavior (Humphrey as the source of acrimony and engaging in multiple lawsuits), these grounds are not "adequately supported by

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(... continued)

Nov. 4, 2004 offer); Appellant's Br. at 41 citing Ex. 227 (\$3.19 million purchase offer).

<sup>45</sup> Appellant's Revised Mot. for Recons. at 12 citing May 27, 2006 letter enclosing seller's statement showing \$3.3 million, CP 284.

<sup>46</sup> Shedd's later appraisal (using \$3.95 million as the cost basis), Ex. 113, Apr. 13, 2007 report at 26. Humphrey's calculation was lower than value of the mirror-image Park 280 building and lower than the Puget Sound properties spreadsheet. Puget Sound Properties' Kent Valley Industrial Sales Comps 2004 (\$85.96/sq.ft.), CP 683-84, also part of Ex. 113.

<sup>47</sup> Ex. 10A (\$3.5 million in 2002).

<sup>48</sup> CP 567; Proposed Order, CP 694.

<sup>49</sup> Humphrey Trial Br. at 7:14-15 ("Judge Hayden has already appointed appraisers to set the fair value, and the Court should adopt one of the measures in those reports."), CP 1358; *id.* at 40:7-9 ("Humphrey, furthermore, stipulated to the adoption of the appraiser's first report, while Clay Street opposed the adoption"), CP 1391.